92-166

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Federal Circuit err in interpreting the "has pending" language in 28 U.S.C. § 1500 ("Section 1500") by overruling four decades of decisional law on Section 1500 that was consistent with the purpose of the statute and which Congress has impliedly affirmed, thereby barring the Claims Court actions of Petitioner Keene Corporation ("Keene")?

2. Did the Federal Circuit err when it barred Keene's Claims Court actions against the Government for indemnity and contribution in thousands of asbestos personal injury cases, ruling that Section 1500 divested the Claims Court of jurisdiction because Keene had impleaded the Government in a single asbestos personal injury claim in federal district court thirteen years ago, even though Keene voluntarily dismissed that complaint a few months after it was filed?

3. Does the Federal Circuit's decision deprive Keene of any opportunity to assert its indemnity claims against the Government in an appropriate forum?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Keene Corporation ("Keene")[1] seeks review of a decision rendered *in banc* by the United States Court of Appeals for the Federal Circuit, *UNR Industries, Inc. v. United States*,

[1] Pursuant to Rule 29.1 of the Rules of this Court, Keene states that it has no parent companies or nonwholly-owned subsidiaries that are required to be named herein. Pursuant to Rule 14.1(b), UNR Industries, Inc., UNARCO Industries, Inc. and Eagle-Picher Industries, Inc. were parties in the proceeding before the Federal Circuit along with Petitioner Keene and the Respondent United States. GAF Corporation was *amicus curiae* in that proceeding.

962 F.2d 1013 (Fed. Cir. 1992). That decision sets forth standards for the application of 28 U.S.C. Section 1500 (1988) ("Section 1500") that vitiate a prior panel decision by the same court, *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed. Cir. 1990). The panel decision would have allowed Keene's claims against the Government, seeking indemnification and contribution in personal injury claims brought against Keene by shipyard workers who allegedly were injured by contact with asbestos-containing products supplied by Keene's former subsidiary under Government contracts, to proceed in the United States Claims Court. The claims involve individuals who, working at United States Navy or Government contract shipyards, were exposed to products containing asbestos fiber sold by the Government and manufactured to Government specifications. The *in banc* decision has unfairly denied Keene its day in court to prove its claims against the Government with respect to the responsibility of the United States for the asbestos litigation problem facing our nation.

If this Petition is granted, Keene will urge this Court to reinstate the Federal Circuit's panel decision, which adopts an analysis of Section 1500 that is consistent with the purpose of the statute.

OPINIONS BELOW

The *in banc* opinion of the Federal Circuit is reported as *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992) ("*in banc* decision"), and is Appendix A to this Petition. The panel opinion of the Federal Circuit is reported as *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed. Cir. 1990) ("panel decision"), and is Appendix D. The orders of the United States Court of Appeals for the Federal Circuit vacating the panel decision and granting rehearing *in banc* are reported at *UNR Industries, Inc. v. United States*, 926 F.2d 1109 (Fed. Cir. 1990 & 1991), and are Appendices B and C. The opinion of the Claims Court is reported as *Keene Corp. v. United States*, 17 Cl. Ct. 146 (1989), and is Appendix E.

JURISDICTION

The judgment of the Federal Circuit was entered on April 23, 1992, the same date as the opinion sought to be reviewed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1988).

STATUTE INVOLVED

28 U.S.C. § 1500 (1988) provides:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT OF THE CASE

1. Keene was formed in 1967 and acquired substantially all of the stock of Baldwin-Ehret-Hill, Inc. ("BEH"), a Pennsylvania corporation, in 1968. BEH became a subsidiary of Keene. BEH resulted from a 1959 merger of Ehret Magnesia Manufacturing Company ("Ehret"), a Pennsylvania corporation, and Baldwin-Hill Company ("B-H"), a New Jersey corporation. In 1970, BEH was merged, and its business was transferred into another Keene subsidiary, Keene Building Products Corporation ("KBPC"). KBPC, BEH, and BEH's corporate predecessors manufactured and sold thermal insulation products and acoustical products containing asbestos.

2. Keene is a defendant in approximately 87,000 pending asbestos personal injury lawsuits, many of which involve exposure at United States Navy or Government contract shipyards, or exposure to products with asbestos fiber purchased from the United States and manufactured pursuant to Government specifications. Over the past fifteen years, Keene has spent nearly $400 million in asbestos personal injury cases. It has been sued

over 136,000 times, and has settled or tried nearly 78,000 cases. New filings continue unchecked – 50 percent more cases have been filed to date in 1992 against Keene than in the comparable period in 1991, and new filings outpace settlements and other dispositions nearly two-to-one. In a widely publicized asbestos compensation program in July 1990, Keene offered approximately $190 million – 80 percent of its net worth – to solve all meritorious personal injury claims. Other defendant companies are similarly situated. Sixteen former manufacturers and distributors of asbestos-containing products have already collapsed under the weight of the asbestos litigation.

3. In December 1979, Keene brought a petition against the Government in the United States Court of Claims seeking indemnification and contribution with respect to thousands of asbestos personal injury actions asserted against it by shipyard workers, *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. 1979) ("*Keene I*") (Appendix H). In June 1979, Keene had filed a third-party complaint against the United States in connection with one individual plaintiff's personal injury claim brought against Keene in *Miller v. Johns-Manville Prods. Corp.*, No. 78-1283E (W.D. Pa. 1979) ("*Miller*") (Appendices I and J); shortly thereafter, in April 1980, Keene voluntarily dismissed this action, stating that it had determined that the Court of Claims action (*Keene I*) "should resolve the differences between the parties." Keene's Motion for Voluntary Dismissal of Claim Against Third-Party Defendant United States of America, *Miller v. Johns-Manville Prods. Corp.* (Appendix G).[2]

4. On September 25, 1981, Keene filed a second petition in the Court of Claims, *Keene Corp. v. United States*, No. 585-81C (Ct. Cl. 1981) ("*Keene II*") (Appendix F), claiming that the

[2] In January 1980, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* ("FTCA"), Keene filed an action against the Government in the United States District Court for the Southern District of New York. This action was dismissed for lack of subject matter jurisdiction on September 30, 1981. *Keene Corp. v. United States*, No. 80-0401 (S.D.N.Y.), *aff'd*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

Government's Federal Employees' Compensation Act recoupments of monies which Keene paid in asbestos personal injury settlements or judgments amounted to an unlawful taking of Keene's property without compensation.

5. Pursuant to Section 1500, the Government moved to dismiss *Keene I* in 1980, but the Court of Claims denied the motion in an unpublished *per curiam* order. Seven years later, in 1987, the Government moved to dismiss *Keene I* and *Keene II*, which were still pending, in addition to Claims Court actions brought by six other manufacturers of asbestos-containing products.[3] Although the Government's motion was filed at the request of the Claims Court *sua sponte*, the Claims Court declined to rule on the Government's motion to dismiss Keene's claims. *Keene Corp. v. United States*, 12 Cl. Ct. 197, 198-99 n.1 (1987), *aff'd sub nom., Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988) (*per curiam*), *cert. denied*, 489 U.S. 1066 (1989) ("*Johns-Manville Corp.*"). On that appeal, the Federal Circuit considered the unsettled question of *what* constitutes a "claim", which a Claims Court plaintiff has pending in any other court against the United States, that would require the Claims Court to decline jurisdiction. It ruled that for Section 1500 purposes, a "claim" is defined by the operative facts alleged. *Johns-Manville Corp.*, 855 F.2d at 1563-64, 1567. The Federal Circuit did not address the issue of *when* a claim had to be "pending" to invoke the bar of Section 1500.

6. In 1988, after the Federal Circuit's decision in *Johns-Manville Corp.*, the Government moved for summary judgment

[3] This motion was purportedly based on Section 1500 grounds and Keene's commencement of a second omnibus FTCA action in the District of Columbia federal court, *Keene Corp. v. United States*, No. 82-2120 (D.D.C. filed July 28, 1982). Relying on the dismissal of Keene's first FTCA action, the D.C. Circuit dismissed Keene's second FTCA action for lack of subject matter jurisdiction in July 1984. *Keene Corp. v. United States*, 591 F. Supp. 1340 (D.D.C. 1984), *aff'd sub nom., GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987).

on complaints filed by Keene and other Claims Court asbestos claimants. It asserted that the Claims Court lacked subject matter jurisdiction over *Keene I* and *Keene II*, declaring that Keene had an identical claim pending against the Government in another forum when Keene filed its Claims Court actions. The Claims Court held that Keene's 1979 claim in *Miller*, extinguished voluntarily by Keene only months after its filing, nonetheless deprived the Claims Court of jurisdiction over *Keene I* pursuant to Section 1500 because *Miller* was filed several months earlier than *Keene I*; *Keene II* was similarly dismissed. This decision ignored the fact that *Miller* had been dismissed when Keene announced that it had decided to seek recovery in Claims Court in *Keene I*, and that Keene's FTCA claims had been dismissed for lack of subject matter jurisdiction.

7. Without considering the limited nature of Keene's third-party complaint against the Government in *Miller*, but simply focusing upon its existence, the Claims Court merged that complaint with the pending federal court actions of several other asbestos claimants and concluded that "[a]ll complaints in other courts and the Claims Court cases seek recovery for costs and expenses incurred and other damages engendered by suits brought by shipyard workers against plaintiffs alleging injury from exposure to asbestos or asbestos products." *Keene Corp. v. United States*, 17 Cl. Ct. 146, 156 (1989).

8. In 1990 the Federal Circuit reversed the Claims Court decision as to Keene. The court examined Section 1500's textual changes from its pre-enactment form in 1868 to its amendment in 1948, and considered various interpretations of the phrase "has pending", given the act's legislative intent, subsequent history and interpretation by federal judges over the past forty years. The panel majority discussed the problem of determining *when* a claim should be considered pending; it concluded that the text provides no rigid test, such as a filing date, for resolving with certitude when a claim is "pending" in order to deny Claims Court jurisdiction under Section 1500. The court found no reliable evidence of Congressional intent on this question. It ruled that jurisdiction exists if a Claims Court plaintiff's earlier-filed district court action is dismissed "before the Claims Court entertains and acts" on a Section 1500 motion to dismiss, even though the Claims Court action was filed before the district court action was dismissed. *UNR Industries, Inc. v. United States*, 911 F.2d 654, 665-66 (Fed. Cir. 1990). The *Miller* third-party action, therefore, was held not to bar Keene's Claims Court actions.

9. The Federal Circuit granted the Government's motion for a rehearing *in banc*, vacated the panel decision, and asked the parties to brief these issues:

> (a) Whether the term "has pending" as used in 28 U.S.C. § 1500 (1988) can be properly construed to mean pending at the time the Claims Court first entertains and acts on a Government motion to dismiss (or its equivalent), regardless of when the Claims Court suit was actually filed; or whether the term "has pending" is properly construed to mean pending at the time when the Claims Court suit was filed;
>
> (b) Whether the case of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966) should be overruled;
>
> . . . .
>
> (d) Whether the rule announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), for determining what is a claim under § 1500 should be reconsidered, and if so, what should be the proper rule.

UNR Industries, Inc. v. United States, 926 F.2d 1109, 1110 (Fed. Cir. 1991).

10. Upon rehearing *in banc*, the Federal Circuit affirmed the Claims Court decision and held that Section 1500 deprived the Claims Court of jurisdiction over Keene's claims. It held that the term "has pending" means pending at the time the Claims Court suit was filed, and if the same claim is pending in another court *before or after* the Claims Court complaint is filed, Section

1500 divests the Claims Court of jurisdiction, regardless of when an objection is raised and acted upon. *UNR Industries, Inc.* v. *United States*, 962 F.2d at 1020-21. In reaching this conclusion, the Federal Circuit overruled *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966) (which held that a claim filed against the United States in another court *after* a Claims Court action is filed does not divest the Claims Court of jurisdiction under Section 1500); *Boston Five Cents Savings Bank* v. *United States*, 864 F.2d 137 (Fed. Cir. 1988); *Brown* v. *United States*, 358 F.2d 1002 (Ct. Cl. 1966); *Hossein* v. *United States*, 218 Ct. Cl. 727 (1978); and *Casman* v. *United States*, 135 Ct. Cl. 647 (1956). The Federal Circuit particularly characterized *Tecon* as "aberrational." *UNR Industries, Inc.* v. *United States*, 962 F.2d at 1023.

SUMMARY OF REASONS FOR GRANTING THE PETITION

First: The Federal Circuit's sweeping decision overruling cases interpreting the "has pending" language of Section 1500, including *Tecon*, is a radical exercise in judicial legislation dissolving four decades of decisional law which Congress has impliedly approved. Indeed, Congress let those cases stand while modifying numerous other jurisdictional and procedural rules. According to these cases overruled by the Federal Circuit, in determining whether a non-Claims Court action is "pending" within the meaning of Section 1500, a court must consider the nature, status and disposition of that action, and not *just* its filing date.

Second: The Federal Circuit erroneously concluded that the *Miller* third-party action embraced the same operative facts as *Keene I*, but failed to examine the elements of each action. The Federal Circuit simply ignored the fact that these two actions do not allege the same facts or involve similar complaints. Section 1500 cannot require the Claims Court to dismiss *Keene I* because it involves a different claim from the earlier-filed *Miller* litigation, and *Miller* was voluntarily dismissed by Keene.

Third: The purpose of Section 1500, which had its genesis in a Civil War-era statute enacted before the development of *res judicata* principles, was to prevent a litigant from forcing

the Government to defend against duplicative litigation; but Keene has not yet had a single opportunity to argue in an appropriate forum the merits of its claims against the United States regarding the Government's responsibility for the asbestos litigation problem facing our nation.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's *in banc* decision, overruling *Tecon* and other longstanding precedent construing the "has pending" language of Section 1500, is a radical exercise in judicial legislation; it effectively deprives many litigants of any opportunity to bring claims against the Government.

A. *Tecon*, *Boston Five Cents*, *Brown*, *Hossein* and *Casman* should not be overruled because they advance the purpose of Section 1500, which is to protect the Government against duplicative litigation.

Prior to the Federal Circuit's *in banc* decision, all authorities construing the meaning of Section 1500 agreed that its purpose was to conserve Government resources and "to relieve the United States from defending the same claims in two courts *at the same time* . . . ." *UNR Industries, Inc.* v. *United States*, 911 F.2d at 663 (panel majority) (emphasis in original). *See also Johns-Manville Corp.*, 855 F.2d at 1562; *Connecticut Dep't of Children & Youth Serv.* v. *United States*, 16 Cl. Ct. 102, 104 (1989); *Casman* v. *United States*, 135 Ct. Cl. 647 (1956) (overruled by the *in banc* decision). Section 1500 thus is a *jurisdiction-depriving* rather than jurisdiction-conferring statute.

In explaining the difference between the federal diversity jurisdiction statute, 28 U.S.C. § 1332 (1988), and Section 1500, the Federal Circuit panel in this case observed:

> Section 1332 creates jurisdiction in a federal court where none would otherwise exist, i.e., no subject matter jurisdiction. The purpose behind § 1500, on the other hand, is to save the Government from having to defend the same suit in two different courts at the

> same time. Section 1500 takes away jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court. Operationally these two statutes focus on different points in time. The former says, "ordinarily your subject matter cannot be here, but if you satisfy the requirements of this statute, then you may *go ahead and proceed* in federal court." The latter says, "though your subject matter may appropriately be here in the Claims Court, if you come within the proscriptions of this statute, then you *may no longer proceed* here."

UNR Industries, Inc. v. *United States*, 911 F.2d at 663-64 (emphasis in original). Section 1500, a Reconstruction-era statute originally enacted to protect the Government against vexatious suits by Confederate property owners, was intended to provide the Government with a shield against duplicative litigation, not a sword to cut off the substantive rights of litigants.

Section 1500 requires the Claims Court to look past its own jurisdictional bounds; it must determine: (1) whether a Claims Court plaintiff has filed a non-Claims Court action; (2) if so, whether that action involves substantially the same claim as the Claims Court action; and (3) whether the plaintiff is attempting to force the Government to defend itself in two places at once, or successively. *See UNR Industries, Inc.* v. *United States*, 911 F.2d at 666 (panel majority); *Tecon*, 343 F.2d at 949.

Tecon held that in determining whether a non-Claims Court action is "pending" within the meaning of Section 1500, a court must examine the nature, status and disposition of that action, as well as its filing date. This principle conforms to the legislative intent of Section 1500, is consistent with prior Section 1500 holdings, and is in harmony with established rules of comity and concurrent jurisdiction.

The plaintiff in *Tecon* filed a complaint in the district court on admittedly identical claims which already were before the Claims Court. It brought its district court action *after* its Claims Court complaint was filed. The plaintiff moved to dismiss the

Claims Court petition because it then "had pending" an identical claim in district court. The Claims Court denied the plaintiff's motion because the facts and circumstances on the date the complaint was filed in the Claims Court confirmed that there was no other suit or process in another court. *Tecon* thus preserved Section 1500 as a shield, because the Government was not required to defend in another court the claims it had already defeated in the Claims Court, even though the plaintiff was literally correct that it "had pending" a claim in another forum.

Tecon followed the reasoning and result in *British American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), in which the plaintiff filed identical actions in the Court of Claims and the district court. The plaintiff prosecuted its claims in the district court through final appeals to the court of appeals, and *certiorari* was denied. The plaintiff then turned to its still-pending action in the Court of Claims and the Government moved to dismiss under the predecessor to Section 1500. The Court of Claims dismissed on the grounds that at the time of filing in the Court of Claims the plaintiff had pending, and elected to prosecute to a decision on the merits, an identical claim in another court.

The only difference between *Tecon* and *British American Tobacco* is that the plaintiff in *Tecon* elected to prosecute the merits in the Claims Court first. In both cases Section 1500 and its predecessor shielded the Government from defending the same action successively in two different courts where the only jurisdiction question raised was the applicability of Section 1500 or its predecessor. *See also Los Angeles Shipbuilding & Drydock Corp.* v. *United States*, 152 F. Supp. 236 (Ct. Cl. 1957).

Following this approach, the Federal Circuit's panel decision properly concluded that focusing only on whether another action existed on the filing date of the Claims Court action "too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind Section 1500." *UNR*

Industries, Inc. v. United States, 911 F.2d at 664. The panel decision properly recognized that a simplistic date-of-filing rule, later propounded in the *in banc* decision, would convert Section 1500 from a jurisdictional shield into a broadsword, severing a Claims Court plaintiff's sole opportunity to pursue its claim. Under the rigid standard now dictated by the *in banc* decision, the "election either to leave the Court of Claims or to leave the other courts" envisioned by the original author of Section 1500, *id.* at 660, is illusory.

Stare decisis commands deference to the long-established construction of a statute, because Congress is free to modify such judge-made law. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation [because] the legislative power is implicated, and Congress remains free to alter what [judges] have done."). Congress has respected the line of authority overruled by the Federal Circuit's *in banc* decision: despite the fundamental changes it has wrought in federal procedural rules over the years, Congress has declined to countermand the rules in those decisions interpreting application of Section 1500. Therefore, Keene's Petition should be granted to allow this Court to review the *in banc* decision.

B. The Federal Circuit's attempt to draw a new "bright line" rule creates confusing new jurisdictional questions for litigants.

The Federal Circuit's effort to create a "bright line" for Claims Court judges actually opens a new frontier of confusing jurisdictional rules to trap litigants with claims or potential claims against the Government, and may deprive them of any chance to assert claims against the United States. As the court observed in *Brown v. United States*:

> Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in [the Claims Court] (*with conceded jurisdiction*, aside from Section 1500) and in another tribunal which is without jurisdiction. *Once the claim has been rejected by the other court for lack of jurisdiction, there is no basis in the policy or working of the statute for dismissal of the claim pending here.*

358 F.2d at 1005 (emphasis added). *Brown* was overruled by the Federal Circuit's *in banc* decision.

At the very least, the doctrine of "equitable tolling" would allow the Claims Court to defer its decision on jurisdiction where a similar action is pending in another court, until facts can be fully examined in that forum which may more precisely inform the Claims Court's deliberations. This is exactly the approach employed in *Hossein v. United States*, 218 Ct. Cl. 727 (1978) (overruled by the *in banc* decision), and suggested by Federal Circuit Chief Judge Nies and Judge Plager in response to the *in banc* majority. *UNR Industries, Inc. v. United States*, 962 F.2d at 1025-26 (Nies, J., additional views), and *id.* at 1026-30 (Plager, J., dissenting). *See also Irwin v. Veterans Admin.*, ___ U.S. ___, 111 S. Ct. 453 (1990) *reh'g denied*, ___ U.S. ___, 111 S. Ct. 805 (1991) (equitable tolling may be available in actions against the United States government).

C. If the *Tecon* rule is modified, a court should only do so prospectively.

The Federal Circuit's attempt to streamline the "has pending" issue under Section 1500 will have the unintended effect of raising a multitude of questions for current litigants who find the rules have just changed in mid-inning because the court's overruling of *Tecon* will apply retroactively.

Even if this Court were to abandon the *Tecon* rule, it should do so only prospectively. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) (setting forth a three-part test to determine whether a new rule announced in a decision should be applied retroactively); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 178 (1990) (affirming the *Chevron* standard to govern retroactivity of civil rules). Overruling *Tecon* destroys a well-established standard relied on by innumerable litigants. Here, as in *Chevron*, "[i]t cannot be assumed that [the litigant]

did or could foresee that this consistent interpretation of the [statute] would be overturned." 404 U.S. at 107. Indeed, as the Claims Court itself specifically noted with respect to these cases:

> [E]ven if *Tecon Engineers* were not binding authority, this court would deny [the Government's] motion regarding later-filed suits. If *Tecon Engineers* is no longer to be the rule, the change should be prospective. Reliance of plaintiffs in the asbestos cases on *Tecon Engineers* was not frivolous.

Keene Corp. v. United States, 12 Cl. Ct. at 216.

Substantial inequitable consequences will result from overruling *Tecon* retroactively.

II. Section 1500 cannot require dismissal of Keene's Claims Court actions because they embrace substantially different facts from those involved in *Miller*.

The Federal Circuit's *in banc* decision dismissed *Keene I*, determining that *Miller* raised substantially the same issues and that the two actions should be considered the same claim for Section 1500 purposes. It held that the Claims Court therefore had no jurisdiction.

However, the two actions are not substantially related: the claim raised in *Miller* differs markedly from the claim raised in *Keene I*, and they do not "allege" the same facts. *Keene I* was an omnibus action seeking Government indemnity and contribution for thousands of personal injury claims filed against Keene by workers employed on naval vessels or in shipyards owned by the Government or operated under Government contracts during a concentrated construction program necessitated by the Second World War and the national defense. Keene asserted that the Government's knowledge of alleged asbestos hazards was superior to Keene's, yet the Government's contracts specified use of asbestos-containing materials. Further, Keene alleged that the Government's lax safety precautions created dangerous levels of exposure in work areas frequented by plaintiffs.

In stark contrast, it does not appear that the *Miller* plaintiff worked in a shipyard, nor does her complaint allege that her employment involved Keene's contracts with the Government, how she was exposed to asbestos-containing materials, or even what asbestos products she handled. Keene's third-party complaint against the Government in *Miller* did not seek to adjudicate the Government's conduct, but merely averred that, during the period of plaintiff's alleged exposure, if she "was exposed to dust or fibers of asbestos products, those products were supplied by the United States Government pursuant to specifications instituted by the United States Government and required by the United States Government Contracts." Keene's Amended Third Party Complaint at ¶ 7 (Appendix I-2-3). Keene has not filed any other third-party complaints against the Government in connection with other asbestos claims; nevertheless, the Federal Circuit has seized upon the anomalous *Miller* third-party complaint to bar Keene from pleading its omnibus case against the Government in the Claims Court.

Moreover, the damage claims asserted in *Keene I* are of a far greater magnitude than those asserted by the sole plaintiff in *Miller*. Keene's liability was not yet established when it impleaded the Government in *Miller*, but it had incurred considerable expense in settlement and litigation costs when it filed *Keene I*.

Finally, Keene's motion for a voluntary dismissal of its third-party claim against the Government in *Miller* expressly stated that it had "instituted an action in the Court of Claims against the United States of America which should resolve the differences between the parties." Keene's Motion for Voluntary Dismissal of Claim Against the Government of the United States of America at ¶ 3, (Appendix G-2). This straightforward statement to the court underscores Keene's honest effort to select the proper forum for its indemnity claim. Plainly, Keene was not attempting to force the Government to defend itself in two places at once.

Keene's impleader of the government in *Miller* should be viewed for what it was – a prophylactic measure to preserve all

available defenses in that one case; its voluntary dismissal should have rendered the third-party complaint a nullity.[4] Curiously enough, the Second Circuit affirmed dismissal of Keene's FTCA claim against the Government because Keene failed to implead the Government in claims brought against it in federal district court.[5] *Keene Corp. v. United States*, 700 F.2d 836, 842-43 n.10 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). This quandary is aggravated, not resolved, by the Federal Circuit's *in banc* decision; it has the effect of penalizing Keene for its voluntary dismissal in *Miller*.[6]

III. Keene has been stripped of any opportunity to air its claims against the Government.

All parties agree that no litigant deserves two bites at the apple, but the Federal Circuit's *in banc* decision deprives Keene of even its first nibble. A plaintiff cannot mount an attack on the Government in two different courts at once, but the Federal Circuit's drastic new rule allows the Government to wield Section 1500 offensively, slamming the Claims Court door against many litigants whose claims are now pending.

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[4] Where a plaintiff moves for voluntarily dismissal, the withdrawn claim is treated as if it had never been filed. *See, e.g., A.B. Dick Co. v. Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878, *reh'g denied*, 344 U.S. 905 (1952); *Navajo Tribe of Indians v. United States*, 601 F.2d 536, 540 (Ct. Cl. 1979), *cert. denied* 444 U.S. 1072 (1980). *See also* C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2367 at 184-87 (1971), and at 54-55 (1992 Pocket Part).

[5] The Second Circuit further observed that the FTCA is not an appropriate vehicle for prosecuting mass tort indemnification claims against the government, because mass tortfeasors cannot plead damages with sufficient particularity for FTCA notice requirements. *Keene Corp. v. United States*, 700 F.2d 836, 845 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

[6] Keene also had argued that the district court's dismissal of its FTCA action required the Claims Court to retain jurisdiction over *Keene II* because the district court held that jurisdiction over Keene's claim for the unconstitutional taking of its property lies exclusively in the Claims Court. The Federal Circuit's *in banc* decision summarily rejected Keene's position, stating that "this relies on the exception *Casman* opened up, and as of today, *Casman* and its progeny are no longer valid." *UNR Industries, Inc. v. United States*, 962 F.2d at 1024.

A court must hold the Government-as-defendant to the same standards it would apply in a contribution claim against General Motors; it cannot erect "roadblocks against claimants seeking to assert a government liability, [if] such blocks would not exist in the case of a suit against a private company." *Johns-Manville Corp.*, 855 F.2d at 1568-70 (per curiam), (Nichols, J., dissenting), *cert. denied*, 489 U.S. 1066 (1989). Protecting the Government from the consuming vortex of asbestos litigation may find policy justification in some quarters, but it cannot excuse the Government from answering Keene's claim for contribution in connection with the millions it has spent to compensate naval shipyard workers. The Federal Circuit's *in banc* decision creates a judicial whipsaw which penalizes Keene and other Government contractors who aided the war effort and the national defense.

Keene is entitled the same access to federal courts guaranteed to all citizens. To forbid Keene an opportunity to litigate its indemnification claim is to raise a disturbing policy question: could the specter of huge liability without Government indemnity, where there is responsibility on the part of the Government, inhibit Government contractors' production of goods in a national emergency? If the manufacturers who have been involved in this litigation knew then what they know now, could they have fully investigated any charges of asbestos hazards and delivered those battleships in time for D-Day?

The Federal Circuit's *in banc* decision distorts the letter and the spirit of Section 1500. The statute was originally designed to protect depleted public resources in the wake of the Civil War's devastation, and prevented Confederate property owners from mounting legal battles on two fronts against the Government they had attacked at Fort Sumter. Today the doctrine of *res judicata* blocks such vexatious tactics; but the Federal Circuit's broadside has the dangerous effect of sealing off a Government contractor from any appropriate forum for its indemnification claim.

IV. Keene's continuing position in the national asbestos litigation dilemma justifies an examination of whether the Government bears any responsibility to Keene.

Asbestos litigation in this country has been termed an "impending disaster."[7] It has been a tragedy for those individuals with meritorious personal injury claims, for the producer companies that have been sued principally under theories of product liability for compensatory and punitive damages, and for the civil justice system – both federal and state – that has been burdened with untold thousands of these claims. Keene has been sued over 156,000 times, and it has settled or tried nearly 78,000 cases. Many of the cases Keene has resolved and many of the 87,000 asbestos personal injury lawsuits now pending against Keene involve exposure at United States Navy or Government contract shipyards, or exposure to products with asbestos fiber purchased from the Government and manufactured pursuant to Government specifications. Keene has spent nearly $400 million in asbestos personal injury cases.

Keene has recognized an obligation to provide fair compensation when appropriate; it recently offered approximately 80 percent of its net worth to compensate all meritorious personal injury claims. Nonetheless, there is a limit to Keene's resources; new filings outpace dispositions by a factor of almost two-to-one. Asbestos litigation has rendered sixteen producers insolvent, and imperils the viability of many others.[8] This Court has

[7] *See Report of the Ad Hoc Committee*, Judicial Conference Ad Hoc Committee on Asbestos Litigation (March 1991) at 26, *cited in* Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?* 13 Cardozo L. Rev. 1819 n.1 (1992).

[8] Brickman, *supra* note 7 at 1819 n.2. The courts have acknowledged the consequences of this dilemma:

> Overhanging th[e] massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most
>
> *(Footnote continued)*

recognized that damages must be imposed according to a rational and systematic process. *Pacific Mutual Life Ins. Co. v. Haslip*, ____ U.S. ____, 111 S. Ct. 1032 (1991).[9] Whether the Government owes contribution and indemnity to Keene is an issue for judicial examination on the merits; procedural reinterpretation of a statute that has bedeviled jurists for decades should not dictate the outcome of this critical debate.

Section 1500 cannot be viewed in an abstract void. The Federal Circuit's *in banc* decision ignores not only the purpose and policy of the statute, but also the very real consequences to Keene; its construction of Section 1500 slams the Claims Court door because Keene impleaded the Government on a single claim thirteen years ago, then withdrew it a few months later. When it redrew Section 1500, the Federal Circuit magnified a procedural point over the purpose of that statute.

In dissenting from the Federal Circuit's *in banc* decision in this case, Judge Plager wrote:

> Congress presumably could have immunized the Federal Government from any liability for its asbestos-related activities; it did not. By general law, Congress has provided the citizens of this country an opportunity to fairly litigate their claims against the United States in the courts of the land. These plaintiffs [including Keene], through no fault of their own, have

> conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of [their] insolvency . . . .
>
> *In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken)*, 129 B.R. 710, 933 (E. & S.D.N.Y. 1991), *quoted in* Brickman, *supra*, at 1820 n.4. *See also* Oliver & Spencer, *Who Will the Monster Devour Next?*, Forbes, Feb. 18, 1991, at 79, *cited in* Brickman, *supra*, at 1820 n.3.

[9] *See also* Brickman, *supra*, at 1819-40; *Report of the Ad Hoc Committee*, *supra* note 7, at 26.

> not had that opportunity. I do not know whether the Government did anything that would make it liable under the law to these plaintiffs, but I do believe that § 1500 was not intended to deny them the opportunity to find out . . . .

UNR Industries, Inc. v. United States, 962 F.2d at 1030 (Plager, J., dissenting).

CONCLUSION

Keene's Claims Court actions should not have been dismissed pursuant to Section 1500. Keene did not have any actions pending against the United States when the Claims Court acted upon the Government's motions to dismiss in that Court; therefore, Keene did not fit within the proscription of Section 1500. The Federal Circuit's *in banc* decision is consistent neither with the history and purpose of the statute nor the judicial precedent construing Section 1500. The Federal Circuit overruled this precedent to arrive at its conclusion. Further, the *Miller* third-party action is not the same claim as that asserted by Keene in the Claims Court. Finally, Keene should be given an opportunity to litigate the merits of its claims against the United States.

Keene respectfully requests that this Court grant its Petition and reverse the decision below.

Respectfully submitted,

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APPENDIX A

UNR INDUSTRIES, INC., Unarco Industries, Inc., and Eagle Picher Industries, Inc., Plaintiffs-Appellants,

v.

The UNITED STATES, Defendant-Appellee.

KEENE CORPORATION,
Plaintiff-Appellant,

v.

The UNITED STATES, Defendant-Appellee.

Nos. 89-1638, 89-1639 and 89-1648.

United States Court of Appeals,
Federal Circuit.

April 23, 1992.

Joe G. Hollingsworth, Spriggs & Hollingsworth, Washington, D.C., argued for plaintiffs-appellants. With him on the brief were William J. Spriggs, Paul G. Gaston and Catherine B. Baumer, of counsel.

John H. Kazanjian, Anderson, Kill, Olick & Oshinsky, P.C., New York City, argued for plaintiff-appellant. With him on the brief were John E. Kidd, Walter G. Marple, Jr. and Arthur S. Olick. Also on the brief were Paul C. Warnke, Harold D. Murry, Jr., and Philip H. Hecht, Howrey & Simon, Washington, D.C.

Robert M. Loeb, Civil Div., Dept. of Justice, Washington, D.C., argued for defendant-appellee. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen. and Barbara C. Biddle. Also on the brief were J. Patrick Glynn and David S. Fishback, Torts Branch, Civil Div., Dept. of Justice, of Washington, D.C.

Sidney S. Rosdeitcher, David G. Bookbinder, Theodore F. Haas and Robert N. Kravitz, Paul, Weiss, Rifkind, Wharton &

Garrison, of New York City, were on the brief for amicus curiae, GAF Corp.

Before NIES, Chief Judge, RICH, NEWMAN, ARCHER, MAYER, MICHEL, PLAGER, LOURIE, CLEVENGER, and RADER, Circuit Judges.

MAYER, Circuit Judge.

This is a rehearing in banc of an appeal from the United States Claims Court, 17 Cl.Ct. 146 (1989), which dismissed the cases of UNR Industries, Inc., Eagle-Picher Industries, Inc., and Keene Corporation because it lacked jurisdiction under 28 U.S.C. § 1500 (1988). An earlier judgment and the opinion of this court, 911 F.2d 654 (Fed.Cir.1990), were vacated, 926 F.2d 1109 (Fed.Cir.1990). We now affirm the judgment of the Claims Court.

Background

Appellants, manufacturers of asbestos products or suppliers of asbestos, sued in the Claims Court for indemnification by the government against liabilities incurred in personal injury suits brought against them by shipyard workers exposed to asbestos. As of the filing of the Claims Court actions, each of the appellants had cases based on the same facts pending in federal district courts. Therefore, the Claims Court dismissed their suits on the authority of 28 U.S.C. § 1500, which reads:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

We set out here only a brief description of the appellants and their activities. A more comprehensive scenario is contained in

the Claims Court opinion. UNR Industries, Inc. (UNR) and Eagle-Picher Industries, Inc. (Eagle-Picher) are among the many defendants in *In re All Maine Asbestos Litigation*, Master Asbestos Docket (D.Me.), a consolidation of 225 suits brought by present or former shipyard workers or their representatives claiming injury from exposure to asbestos at the Bath Iron Works, a private shipyard, and the Portsmouth Naval Shipyard, both in Maine. On July 21, 1982, the defendants in that litigation, including UNR and Eagle-Picher, filed third-party complaints for contribution or indemnification against the United States in the United States District Court for the District of Maine. The third-party complaints were drafted pursuant to model complaints and were based on theories of negligence, strict liability, and breach of warranty. Model Complaint A dealt with injuries allegedly incurred at the Bath Iron Works, while Model Complaint B dealt with injuries alleged at the Portsmouth Naval Shipyard. On January 16, 1984, UNR sued the United States in the Claims Court, No. 16-84C, for breach of contract based on warranties allegedly arising from the government's role in the use of asbestos in the shipyards. The Claims Court's jurisdiction over this suit is at issue today.

On July 16, 1986, the district court issued a final order dismissing Model Third-Party Complaint B. *In re All Maine Asbestos Litigation (Portsmouth Naval Shipyard Cases)*, Master Asbestos Docket (D.Me.); *see also* 772 F.2d 1023 (1st Cir.1985); 581 F.Supp. 963 (D.Me.1984). And on March 12, 1987, the court dismissed the last claims of Model Third-party Complaint A. *In re All Maine Asbestos Litigation (Bath Iron Works Cases)*, 655 F.Supp. 1169 (D.Me. 1987), *aff'd*, 854 F.2d 1328 (Fed.Cir.1988).

Eagle-Picher is also a defendant in cases in the Western District of Washington for asbestos-related injuries suffered by workers at the Puget Sound Naval Shipyard. As part of this litigation, on February 3, 1983, Eagle-Picher filed ten third-party complaints founded on theories of negligence, breach of warranty, and admiralty against the government. These complaints were dismissed for failure to state a claim on May 19 and June 30, 1986. *Lopez v. Johns-Manville*, 649 F.Supp. 149

(W.D. Wash.1986), *aff'd sub nom. Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed.Cir.1988).

On March 25, 1983, Eagle-Picher sued the government in the Claims Court to recover money paid for litigating and settling claims arising from asbestos-caused injuries. No. 170-83C. It relies on contractual theories that the government created warranties by specifying the use of asbestos and by controlling the workplace. The Claims Court's jurisdiction over this lawsuit is at issue.

Along with eight other asbestos suppliers, in 1978 Keene Corporation (Keene) was sued by the representative of a laborer allegedly injured by asbestos exposure in 1943. *Miller v. Johns-Manville Bldg. Products*, No. 78-1283E (W.D.Pa. filed Nov. 8, 1978). On June 1, 1979, Keene initiated a third-party complaint against the government, demanding indemnification or contribution because the asbestos was either supplied by, or according to the specifications of, the government. Although Keene moved to dismiss this third-party action on April 23, 1980, it is unclear whether the court acted on the motion; regardless, Keene has accepted a dismissal date of May 13, 1980.

On December 21, 1979, Keene sued in the Court of Claims on the theory that the government as an asbestos supplier and as the regulator of the workplace had made and breached various warranties appertaining to asbestos. No. 579-79-C (*Keene I*). It is seeking damages growing out of more than 5,000 suits filed against it by persons alleging injuries from asbestos exposure as early as the mid-1930's. Jurisdiction over this suit is at issue.

On January 22, 1980, Keene sued the government in the District Court for the Southern District of New York under the Federal Tort Claims Act for what it spent defending and settling thousands of lawsuits alleging asbestos-related injuries incurred as far back as the 1930's. It based this suit on theories of breach of warranty, negligence, strict liability, and the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1976). On September 30, 1981, the court dismissed the suit as barred by

the doctrine of sovereign immunity. *Keene Corp. v. United States*, No. 80-Civ-0401 (S.D.N.Y. Sep. 30, 1981), *aff'd*, 700 F.2d 836 (2d Cir.1983).

On September 25, 1981, Keene filed its second suit against the government in the Court of Claims. No. 585-81C (*Keene II*). Again, it demands damages for the defense, settlement, and judgment costs of asbestos-related personal injury claims dating back to the 1930's. Further, it alleges a violation of the fifth amendment because the government recouped from Keene payments under the Federal Employees' Compensation Act that it paid to workers suffering from asbestos-related injuries. We must also decide whether the Claims Court has jurisdiction over this case.

The Claims Court interpreted section 1500 as forbidding jurisdiction "if, as of the date an action is filed, plaintiff has pending in another federal court the same claim." 17 Cl.Ct. at 155.

> The jurisdictional inquiry targets the date of filing in the Claims Court, not some subsequent date, such as the date on which the Government is made aware of the antecedent action, or the date on which the Government invokes section 1500 seeking to dismiss the Claims Court action, or the date on which the Claims Court acts. Therefore, a plaintiff cannot cure a want of jurisdiction in the Claims Court by voluntarily or involuntarily dismissing its parallel action, or even by suffering a court-ordered termination on the merits.

Id. (citation omitted). The court concluded that under the standard announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988), the complaints of each appellant in both the district courts and the Claims Court were based on a "homogeneity of operative facts." 17 Cl.Ct. at 156. It dismissed them, as well as those of Fireboard Corporation, H.K. Porter Company, Inc., and Raymark Industries, Inc., who have not appealed, because a case based on the same facts was pending in another court as of the date each plaintiff filed its Claims Court

action. The complaint of GAF Corporation, an amicus curiae here, was not dismissed because of an exception to section 1500 set out in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965).

In the order accepting the suggestion for this rehearing in banc, 926 F.2d 1109, 1110 (Fed.Cir.1991), we directed the parties to address the following questions:

> a) Whether the term "has pending" as used in 28 U.S.C. § 1500 (1988) can be properly construed to mean pending at the time the Claims Court first entertains and acts on a Government Motion to dismiss (or its equivalent), regardless of when the Claims Court suit was actually filed; or whether the term "has pending" is properly construed to mean pending at the time when the Claims Court suit was filed;
>
> b) Whether the case of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965), *cert. denied*, 382 U.S. 976, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) should be overruled;
>
> c) Whether a petition for writ of *certiorari* is a "suit or process against the United States" as that phrase is used in § 1500;
>
> d) Whether the rule announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), for determining what is a claim under § 1500 should be reconsidered, and if so, what should be the proper rule.

Discussion

I.

The statutory history is fairly straightforward. During the Civil War, Congress passed the Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820, which allowed property in the Confederate states to be seized and used by the government for war purposes. If the property was not so used, it was sold and the proceeds deposited in the Treasury. *Id.* ch. 120, § 2, 12 Stat. 820. Claimants to the property could recover any proceeds from its sale if they filed in the Court of Claims, proved ownership, and proved by a preponderance of the evidence that they had not aided or provided comfort to the rebellion. *Id.* § 3, 12 Stat. 820.

Most of the claims were for cotton seized during the war. *See, e.g., Whiteside v. United States*, 93 U.S. 247, 23 L.Ed. 882 (1876). These so-called "cotton claimants" had a hard time proving that they had not aided the confederacy and therefore their chances for recovering the proceeds from the sale of their cotton were slim. To better their chances, they filed suit against federal officers in the state or federal district courts, as well as against the United States in the Court of Claims. In 1868, Congress sought to put an end to this practice by enacting the predecessor to section 1500:

> Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Act of June 25, 1868, § 8, 15 Stat. 75, 77. On the floor of the Senate, the sponsor, Sen. Edmunds of Vermont, read the proposed bill[1] and then added:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong.Globe, 40th Cong., 2d Sess. 2769 (1868). From this, the only legislative history, we see that the statute was intended to force plaintiffs to choose between pursuing their claims in the Court of Claims or in another court, "[t]he object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts." Thus, the claimants would not be able to "put the Government to the expense of beating them once in a court of law" and then try the question again in the Court of Claims. The statute also ameliorated the consequences of the unavailability of the defense of res judicata from cases against a federal officer in cases against the government itself, and vice versa.

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[1] The text of the proposed bill, as read by Senator Edmunds on the floor of the Senate, is as follows:

> Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending, *or shall commence*

(Footnote continued)

Section 8 was therafter incorporated into the Revised Statutes of 1874. The few changes made to it then were not intended to alter its meaning in any way. 2 Cong. Rec. 129 (daily ed. Dec. 10, 1873) (statement of Rep. Butler). Section 8 was renumbered as section 1067 and provided:

> Sec. 1067. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

Revised Statutes of the United States, Title 13, § 1067, ch. 21, 18 Stat. 197 (1874). After the turn of the century, section 1067 was adopted without change as section 154 of the Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1135, 1138 (codified at 28 U.S.C. § 260 (1940)).

As part of the revision of the Judicial Code in 1948, Congress essentially reenacted section 154. The new statute read:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or

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and have pending, any suit or process in any other court against any officer or person who, at the time of the cause *as above* alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

81 Cong.Globe, 40th Cong., 2d Sess. 2769 (1868) (emphasis added). The only changes between the statute as proposed and as enacted is the unexplained deletion and substitution of the underscored text.

> his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Act of June 25, 1948, ch. 646, 62 Stat. 942 (codified at 28 U.S.C. § 1500 (1948)). Thus, three changes were made to the statute. First, the language "or in the Supreme Court on appeal therefrom" was deleted as "unnecessary." Reviser's Notes, 28 U.S.C. § 1500, p. 1862 (1948). Second, the phrase "against the United States" was added, making it clear that dual litigation against the United States, as well as against a federal officer, was barred. *See Matson Navigation Co. v. United States*, 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932). The third change was that the language "No person shall file or prosecute" was replaced by "The United States Court of Claims shall not have jurisdiction," confirming the jurisdictional bar against the Court of Claims earlier set out by the Supreme Court in *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86, 95, 44 S.Ct. 446, 448, 68 L.Ed. 912 (1924). Appropriately, the only note accompanying the new statute states that any changes were "in phraseology" only. Reviser's Notes, 28 U.S.C. § 1500, p. 1862 (1948). The most recent change to section 1500 in 1982 merely reflected the establishment of the Claims Court in place of the Court of Claims by substituting the former name for the latter. Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 40.

II.

By comparison with the history of the statute, the attendant judicial development was erratic. In *Corona Coal Co. v. United States*, 263 U.S. 537, 540, 44 S.Ct. 156, 156, 68 L.Ed. 431 (1924), the appellants complained that they were forced to file suit in a district court after they appealed to the Supreme Court from the Court of Claims or else their district court action would have

become time barred. Therefore, they argued, their actions were not "within the spirit of § 154 properly construed."[2] The Court responded that "the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases." *Id.* It dismissed the appeal.

In *British American Tobacco Co., Ltd. v. United States*, 89 Ct.Cl. 438 (1939), the Court of Claims declined two arguments now urged by appellants, which we address more fully below. First, the court rejected the notion that the word "claim" referred only to the legal theory on which a case is brought as opposed to the subject matter of the suit. *Id.* at 440. So, even though a district court action may sound in tort and the one in the Court of Claims may sound in contract, if they are based on the same operative facts, they are the same claim. *Id.* Second, it was irrelevant that a district court action pending when plaintiff filed suit in the Court of Claims was dismissed before the Court of Claims ruled on the motion to dismiss; "there is no merit in the contention now made by plaintiff that this court has jurisdiction and that plaintiff is now entitled to prosecute the claim presented by the petition in this court for the reason that the suit in the District Court has been dismissed and is not now pending." *Id.* at 441.

When first presented the question, the Court of Claims also held that under section 1500 actions filed in other courts *after* Court of Claims petitions were filed divested it of jurisdiction. In *Maguire Industries, Inc. v. United States*, 86 F.Supp. 905, 114 Ct.Cl. 687 (1949), it held that it had no jurisdiction where subsequent to filing a petition in the Court of Claims, plaintiff appealed a Tax Court decision to the court of appeals. Likewise,

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[2] As discussed, section 154 is the predecessor of section 1500 and included appeals to the Supreme Court. Therefore, the effect on jurisdiction over cases pending in the Court of Claims and appeals pending in the Supreme Court when an action in another court had been filed was the same.

Hobbs v. *United States*, 168 Ct.Cl. 646 (1964), held that there was no jurisdiction where the day after filing its Court of Claims petition, plaintiff filed an appeal of an administrative decision dealing with the same facts in a court of appeals.

The Court of Claims recognized that section 1500 was intended to protect the United States from having to defend two lawsuits over the same matter simultaneously. *Wessel, Duval & Co.* v. *United States*, 124 F.Supp. 636, 637, 129 Ct.Cl. 464 (1954); *Frantz Equipment Co.* v. *United States*, 98 F.Supp. 579, 580, 120 Ct.Cl. 312 (1951). Relying on the explicit language of section 1500, it held that its jurisdiction over a case could not be dependent on whether or not a district court had jurisdiction, even if the statute of limitations may have run in the Court of Claims. *Frantz*, 98 F.Supp. at 580. And because section 1500 is purely jurisdictional, there is no basis "for finding saving exceptions unless they are made explicit." *Wessel, Duval & Co.*, 124 F.Supp. at 638 (quoting *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 390, 73 S.Ct. 381, 383-84, 97 L.Ed. 422 (1953)).

Notwithstanding all this, in *Casman* v. *United States*, 135 Ct.Cl. 647 (1956), the Court of Claims found an exception to section 1500's clear mandate. It sustained jurisdiction over a former government employee's petition for back pay even though a suit for restoration to duty was pending in a district court. The court rationalized that the types of relief sought in the two courts were "entirely different" and that therefore section 1500 was inapplicable. *Id.* at 650.

In *Tecon*, 343 F.2d 943, the Court of Claims again succumbed to revision of section 1500 and held that a complaint filed in district court *after* a petition is filed in the Court of Claims did not defeat jurisdiction. The court tried to justify this by stating that "[f]or the most part" its earlier precedent involved "situations where suit was filed in another court prior to, or simultaneous with, the filing of the petition in this court." *Id.* at 950 (footnotes omitted). To the contrary, however, as we have seen, in *Hobbs*, the other suit was filed one day *after* the Court

of Claims petition. In *Maguire Industries*, cited as an example of a case in which the filing in the other court was *before* the Court of Claims petition, the event which ousted the Court of Claims of jurisdiction under section 1500 was the appeal of a Tax Court decision *subsequent* to the filing of the Court of Claims petition.

The facts underlying *Tecon* probably explain the court's desire to retain jurisdiction. Taxpayers sued in the Court of Claims for a refund of federal income taxes and civil fraud penalties. After much discovery, several pretrial conferences, and several trial postponements, plaintiffs filed the same claims in a district court and then moved the Court of Claims to dismiss its case under section 1500. An exasperated Court of Claims retained jurisdiction so it could dismiss the case with prejudice for failure to prosecute. We suspect this abuse of process and vexatious litigation would have been appropriately punished by the district court if this breach of jurisdictional jurisprudence had not intervened. We are quite certain that a district court would not hesitate to invoke Federal Rule of Civil Procedure 11 if faced with this kind of conduct today. *See also* 28 U.S.C. § 1927 (1988).

In *Brown* v. *United States*, 358 F.2d 1002, 1003, 175 Ct.Cl. 343 (1966), plaintiffs, a widow and surviving children, claimed their rice acreage allotments were so reduced as to amount to a governmental taking without compensation. They also filed their complaint in a district court. The government successfully moved for dismissal pursuant to section 1500, but when the district court dismissed the plaintiff's case for lack of jurisdiction, the Court of Claims reinstated its case, because "[i]n this situation, we do not believe that 28 U.S.C. § 1500 requires us to deprive plaintiffs of the only forum they have in which to test their demand for just compensation." *Id.* 358 F.2d at 1004.

Without discussing *Brown*, the Court of Claims crafted another exception to section 1500 in *Hossein* v. *United States*, 218 Ct.Cl. 727 (1978). There, the plaintiff filed a three count complaint in the Court of Claims and contemporaneously filed suit in a federal district court on the same claim. Because

count II alleged negligence and count III requested specific performance, the Court of Claims dismissed them. But because count I could be read to allege a contract implied in fact, the court retained jurisdiction but stayed consideration of the count "for reasons of comity and avoidance of piecemeal litigation," until the federal district court ruled. *Id.* at 729.

Recently, we revisited section 1500 in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, and held that for the purposes of section 1500, two lawsuits involve the same "claim" if they are based on the same operative facts. After discussing the meaning of section 1500, we responded to Johns-Manville's arguments that our holding was unfair: "[p]rinciples of equity do not support finding jurisdiction exists. A court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." *Id.* at 1565. We also held that a prior-filed, but stayed, district court action is "pending" within the contemplation of section 1500. *Id.* at 1567. But *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137, 139 (Fed.Cir.1988), heavily depended on the *Casman* and *Hossein* exceptions when it held that because a declaratory judgment was sought in the district court and monetary damages in the Claims Court, both suits could be maintained even if based on the same operative facts.

III.

As can now be seen, section 1500 is rife with judicially created exceptions and rationalizations to the point that it no longer serves its purposes: to force an election of forum and to prevent simultaneous dual litigation against the government. It is a rare plaintiff who could not find an exception to his liking if he tried hard enough. Appellants tell us this has come about because of the perceived harshness of the statute, but we see no harm in requiring a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statutes of limitations. Indeed, a prohibition against suing the government simultaneously in multiple forums, and the likely inability to sue the government twice successively, are even more salutary in this day of excessive litigation than

they were back in the Civil War era whence section 1500 comes. Nor is stare decisis a reason not to revisit the jurisprudence encumbering this statute. It is now so riddled with unsupportable loopholes that is has lost its predictability and people cannot rely on it to order their affairs.

[1-3] Therefore, we hold today that in accordance with the words, meaning, and intent of section 1500: 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.

A.

We reach our interpretation of the law by considering and rejecting appellants' arguments that we continue the charade that section 1500 has become and engraft another exception on it. We are told that suits against the United States for more than $1,000,000,000 incurred by appellants because of asbestos exposure by workers allegedly following federal contract requirements depend on these arguments. We cannot fault appellants' attempt to test the government's liability. But we cannot countenance the method.

Appellants argue first that section 1500 only bars Claims Court jurisdiction when claimants have other cases pending on the date the Claims Court entertains a motion to dismiss. Thus, cases filed in other courts before the Claims Court complaint, but dismissed for whatever reason before a motion to dismiss is acted on by the Claims Court would be irrelevant. We think such a scheme would not only contradict the meaning and purposes of section 1500 but would create an arbitrary and whimsical jurisdictional result. By the plain language of section 1500,

if the same claim is pending in another court when the plaintiff files his complaint in the Claims Court, there is no jurisdiction, period, even if the conflicting claim is no longer pending when a motion to dismiss is brought or considered by the court.

The construction urged by appellants was held to be meritless in *British Am. Tobacco Co. v. United States*, 89 Ct.Cl. at 441. Section 1500 states explicitly and unequivocally that the Claims Court "shall not have jurisdiction" over any claim with respect to which plaintiffs have suits pending in other courts. There is nothing in section 1500 to suggest a free floating jurisdictional bar that attaches only when the government files a motion to dismiss or, worse, when the court gets around to acting on it. Jurisdiction cannot be bestowed by the parties. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982). And it is the duty of a court to actively police its jurisdictional boundaries; the state of a trial court's docket or the diligence of the assigned judge has no role in determining the existence of jurisdiction.

As discussed above, the original purpose was to force an election between a suit in the Court of Claims and a suit in another court on essentially the same claim. To permit a plaintiff to maintain cases in both courts until the government moves to dismiss the Claims Court suit or until a judge addresses the motion would compel the government to defend two suits simultaneously, contrary to this recognized purpose of section 1500.

From the language of the original statute, "no person shall file or prosecute any claim . . . for or in respect to which he . . . has pending any suit or process in any other court," it is readily apparent that any suit *filed* in the Court of Claims when the same claim was pending in another court fell within the statutory bar and had to be dismissed, no matter when the jurisdictional objection was raised and regardless of intervening actions in the conflicting case. When Congress changed the statute in 1948 to read "the Court of Claims shall not have jurisdiction . . .," the meaning was not changed; the note observed that changes were in "phraseology" only. No changes in

substantive law may be presumed from the 1948 Revision of the Judicial Code "unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227, 77 S.Ct. 787, 791, 1 L.Ed.2d 786 (1957).

It is fundamental that jurisdiction is established, if at all, at the time suit is filed. *Smith v. Sperling*, 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1114 n. 1, 1 L.Ed.2d 1205 (1957). We presume the drafters of section 1500 knew this; if they intended the interpretation urged by appellants, they would have manifested this by appropriate words.

All jurisdictional rules are absolute. The Supreme Court stressed this in implementing section 154 according to the plain meaning in *Corona Coal*, 263 U.S. at 540, 44 S.Ct. at 1157. But in *Brown v. United States*, 358 F.2d 1002, the Court of Claims sought to avoid the supposed harshness of that rule, at least for that case. It reasoned that "Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in [the Court of Claims] (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction," *id.* at 1005. In light of the plain meaning and purpose of the statute, we disagree. It may have seemed unfair "to deprive plaintiffs of the only forum they [had] in which to test their demand," *id.* at 1004, but that does not justify rewriting the statute. *Brown* is overruled.[1] To the extent *Brown* can be read as a case brought in the wrong court, 28 U.S.C. § 1631 (1988) now permits a transfer to the court that has jurisdiction if the transferring court believes it to be in the interest of justice. But that would not have helped here because appellants were in courts with jurisdiction; their complaints based on the Federal Tort Claims Act and Little Tucker Act were dismissed

[1] We also overrule cases like *Casman*, 135 Ct.Cl. 647, *Hossrin*, 218 Ct.Cl. 727, and *Boston Five Cents*, 864 F.2d 137, which declined to dismiss complaints in the Claims Court when the same claim was the basis for a case pending in district court.

on the merits with prejudice. *See, e.g.*, 581 F.Supp. at 968-80; 655 F.Supp. at 1171-76.

B.

Section 1500 states that the "Claims Court shall not have jurisdiction of any claim . . . in respect to which the plaintiff . . . has pending in any other court *any suit or process*." A case filed subsequent to a Claims Court complaint is clearly a "pending . . . suit or process." Thus, by the command that the Claims Court "shall not have jurisdiction," upon the occurrence of the triggering event, the filing of suit in another court, the Claims Court is automatically divested of jurisdiction. Congress wanted not to dictate the order in which a claimant files suits in the Claims Court and another court on the same claim, but to discourage him from doing so altogether. Otherwise the purpose of saving the government from defending the same claim in two courts at the same time would be defeated. Of course, it is axiomatic that once jurisdiction attaches, subsequent activities by the parties do not affect it. *Mollan v. Torrance*, 22 U.S. (Wheat) 537, 539, 6 L.Ed. 154 (1824). But the result here occurs by operation of law.

We are today undertaking a comprehensive effort to set out the proper interpretation of a jurisdictional statute, a matter that does not require a pointed dispute between parties. Courts are obliged to resolve jurisdictional questions on their own even if parties do not raise them. In the course of this interpretative effort, if prior cases are seen as inconsistent, it is incumbent on the court to acknowledge their nonviability. For that reason we revisit *Tecon*, 343 F.2d 943, an aberrational case which stands astride the path to a proper interpretation of section 1500 as it pertains to a post Claims Court filing in another court.

Our role comports with cases from both the Supreme Court and the Court of Claims prior to, but ignored by, *Tecon*, as laid out above. *Corona Coal*, 263 U.S. 537, 44 S.Ct. 156, dismissed an appeal from the Court of Claims to the Supreme Court under section 154 because the plaintiff had filed suit in district court

on the same claim after the appeal was lodged. *Hobbs*, 168 Ct.Cl. 646, and *Maguire Industries*, 86 F.Supp. 905, are to the same effect.

Tecon erroneously relied on the deletion of the words "or shall commence and have pending" from the original bill proposed by Sen. Edmunds as section 8 of the Act of June 25, 1868. 343 F.2d at 947. Aside from the fact that there is no indication why section 8, as enacted, did not include this language, its deletion did not change the plain meaning of the statute; it was superfluous. Since pertinent changes to the statute that came later were in phraseology only, its meaning from the beginning is that the Claims Court loses jurisdiction when the same claim is filed in another court. *Tecon* is overruled.

IV.

That the word "claim" does not refer to a legal theory, contrary to appellants' argument, but to a set of underlying facts, comports with the language and history of section 1500. As we discussed in *Johns-Manville*, 855 F.2d at 1561, the cotton claimants were not able to bring their lawsuits in the Court of Claims and the other courts on the same theory.* Therefore, to accept appellants' argument would be to interpret section 1500 in a way that would have rendered it ineffective against the very abuse it initially targeted. Courts strive to avoid nonsensical interpretations. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982).

Appellants base much of their argument against *Johns-Manville*, that we have given section 1500 "an unjustifiably broad interpretation," on the perceived unfairness of the concept that

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* A cotton claimant would have had to bring his Court of Claims action against the United States under the Captured and Abandoned Property Act of 1863, ch. 120, § 3, 12 Stat. 820, while he would have had to bring his district or state court action against a federal agent under a tort theory. *Johns-Manville*, 855 F.2d at 1561.

claims are the same when they involve the same operative facts. But once again, we cannot extend jurisdiction in the interest of equity. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988). Further, section 1500 states that appellants cannot have pending any Claims Court claims "for or in respect to which" they had claims pending in district courts. This precludes the argument that the facts must be precisely the same at all events. The question in *Johns-Manville* was whether the Tucker Act claim was "in respect to" the tort claim in the district court. We reaffirm that, correctly construed, section 1500 applies to all claims on whatever theories that "arise from the same operative facts." 855 F.2d at 1567. For example, in this case, all of appellants' claims are founded on or "arise from" personal injuries suffered by workers, even though the complaints allege various theories of recovery. A contrary conclusion would permit plaintiffs to evade the strictures of section 1500 by drafting complaints in separate suits based on minor differences in facts which, in reality, relate to the same dispute.

Indeed, the meaning of "claim" has never really been otherwise. As far back as 1939, the Court of Claims stated emphatically that the meaning of claim was not dependent on the legal theory proposed. *British Am. Tobacco Co. v. United States*, 89 Ct.Cl. at 440; *see also Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F.Supp. 236, 238, 138 Ct.Cl. 648 (1957). We decline to disturb either this precedent or *Johns-Manville*.

V.

[4] On June 1, 1989, when the Claims Court dismissed Eagle-Picher's complaint, a petition for writ of certiorari was pending in the Supreme Court pertaining to the dismissal of Eagle-Picher's Federal Tort Claims Act and Little Tucker Act suit in the Western District of Washington. *Lopez v. Johns-Manville*, 649 F.Supp. 149 (W.D.Wash.1986), *aff'd sub nom. Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed.Cir.1988), *cert.denied*, 491 U.S. 904, 109 S.Ct. 3185, 3186, 105 L.Ed.2d 694 (1989). Eagle-Picher

argues creatively to the contrary, but there is no question that a petition for writ of certiorari is a "pending . . . suit or process." 28 U.S.C. § 1500. Eagle-Picher says a petition for a writ of certiorari is merely a request to review cases from the court of appeals for error, it is not directed against the government. Nor is the case "pending" any longer because the lower court judgment is not stayed. But a certiorari petition to the Supreme Court is unarguably a process, if not a suit. And it is a process against the respondent, not the court of appeals. The government was the respondent in *Lopez*; the court of appeals stood indifferent to whether the petition was granted or denied. Finally, the absence of a stay is irrelevant, and does not change the character of the papers in the Supreme Court. Judgments of district courts are not stayed either, absent a motion, but that does not take them outside the scope of section 1500.

Our holding today that cases pending in other courts on the date of filing in the Claims Court divest that court of jurisdiction renders this question secondary, if not moot. Eagle-Picher had cases pending in other courts when it filed its Claims Court action; therefore that action was properly dismissed regardless of the petiton for writ of certiorari. Nevertheless, having posed the question when ordering rehearing in banc, and because the matter is integral to the interpretation of a jurisdictional statute, as we discussed earlier, we are constrained to explain the role of a petition for certiorari in the context of this scheme.

VI.

[5] The Claims Court dismissed UNR's and Eagle-Picher's suits because both had pending district court cases against the government when they filed their Claims Court complaints. Because we reaffirm our view in *Johns-Manville* that claims are the same if they involve the same underlying facts, and because we have no dispute with the Claims Court's factual analysis of UNR's and Eagle-Picher's claims, 17 Cl.Ct. at 156, we affirm the dismissal of their complaints.

Keene says that even under *Johns-Manville*, the facts underlying its first petition in the old Court of Claims (*Keene I*) are not the same as the facts at issue in *Miller*, and its voluntary dismissal in *Miller* renders it a nullity. We think not. Keene's voluntary dismissal of the third party complaint is irrelevant because dismissal did not occur until after Keene filed its Court of Claims petition. The complaint was pending when *Keene I* was filed; therefore, the Claims Court has no jurisdiction. And we have no quarrel with the Claims Court determination that the underlying facts in *Miller* and *Keene I* are the same.

Keene also asserts that because *Keene II* requests relief different from its indemnification suit in the Southern District of New York, the Claims Court has jurisdiction. But this relies on the exception *Casman* opened up, and as of today, *Casman* and its progeny are no longer valid.

Finally, appellants ask that any decision on section 1500 inconsistent with their arguments be applied prospectively. But we are not at liberty to so limit our judgment. As early as 1807, Chief Justice Marshall said that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93, 2 L.Ed. 554 (1807). Later, the Supreme Court admonished that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850). And only recently, the Court cautioned that courts have no authority to reach the merits of a case in the absence of subject matter jurisdiction, even if they perceive it to be "in the interest of justice" to do so. *Christianson*, 486 U.S. at 818, 108 S.Ct. at 2178.

The Claims Court is absolutely without authority to decide any case which does not fit within its statutory grant of jurisdiction. Because we decide today that section 1500 precludes the Claims Court from exercising jurisdiction over these claims, we cannot direct it nevertheless to address the merits, even if the parties otherwise may incur hardship. "A court lacks discretion

to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981). We are not unaware of the detriment parties might suffer after spending years litigating, only to find that the chosen court lacks jurisdiction. But we must abide by the "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." *Christianson*, 486 U.S. at 818, 108 S.Ct. at 2178; *see also Johns-Manville*, 855 F.2d at 1565. We have no discretion to apply this judgment only prospectively.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), is not to the contrary. The Supreme Court there declined to retroactively apply the effect of its declaration that the Bankruptcy Act of 1978 was unconstitutional because this "would surely visit substantial injustice and hardship on those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts," and this decision was "an unprecedented question of interpretation of Art. III."[5] *Id.* at 88, 102 S.Ct. at 2880. To do otherwise would have created chaos in the bankruptcy system and the Court expressly gave Congress a time certain by which to fix the constitutional problem. But in keeping with the teaching of *Firestone Tire* and *Christianson*, it did not permit the bankruptcy judges to continue to perform the forbidden duties even in the case before it. *Id.* at 87 n. 40, 102 S.Ct. at 2880 n. 40. That is to say, it prospectively declared the Act unconstitutional and the courts without jurisdiction, but it did not nevertheless allow the case to be decided on the merits, as we are urged to do here. And there is a significant difference between the reliance on a clear congressional grant of jurisdiction in *Northern Pipeline*, and the activities of these appellants who were trying to circumvent section 1500.

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[5] Indeed, only a plurality of the Court concluded the Act was unconstitutional in all its ramifications. A majority was reached only for the unconstitutionality of the exercise of Article III powers over traditional actions at common law by Article I judges. *See* 458 U.S. at 91, 102 S.Ct. at 2882 (Rehnquist, J., concurring in judgment).

Conclusion

Accordingly, the judgment of the Claims Court is affirmed.

AFFIRMED.

NIES, Chief Judge, additional views.

I join the majority opinion holding that section 1500 precludes the U.S. Claims Court from exercising jurisdiction over any claim which is pending in another court. I write here because of my view of other precedent, not discussed by the majority, facing those who seek (1) relief obtainable only outside the Claims Court, and (2) relief obtainable only within the Claims Court. If those litigants fail to complete litigation in one forum prior to the running of the statute of limitations in the other, they will be confronted with the decision of Court of Claims in *Ball v. United States*, 137 F.Supp. 740 (1956), which held that the pendency of a suit in district court could not toll the running of the statute of limitations on the cause of action in the Court of Claims. However, the Court of Claims left open the question whether the *Ball* plaintiff was foreclosed from pursuing both actions concurrently. A few months later, the Court of Claims in *Casman v. United States*, 135 Ct.Cl. 647 (1956) created the exception to section 1500, overturned today, that suit in the Court of Claims was permitted where the relief sought in a district court was equitable in nature and could not be obtained in the Court of Claims.

While technically *Ball* preceded *Casman*, I believe the two cases are interdependent. Thus, in light of today's ruling on *Casman*, I believe the precedent of *Ball* is seriously eroded. Moreover, *Ball* would require revisiting in any event because of the recent decision of the Supreme Court, *Irwin v. Veterans Admn.*, ___ U.S. ___, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) holding that equitable tolling may be available in suits against the United States. Where a party has possibly two claims for relief and is barred from asserting them concurrently by section 1500, I do not believe the period allowed for bringing the

additional or alternative claim should arbitrarily be cut off or even shortened. Section 1500 does not require such forfeiture. Some cases may be dealt with by the transfer statute, 28 U.S.C. § 1631 (1988). However, as the majority opinion indicates, it would not apply where the merits are litigated. In any event, the option of tolling the statute of limitations should be available to the Claims Court despite the *Ball* decision.

PLAGER, Circuit Judge, dissenting.

I respectfully dissent. I find myself in disagreement with the court on three issues which cause me to come to a different conclusion. They are: (1) the significance of the various amendments to the act, and whether the act is 'plain' on its face or, as I believe, in need of interpretation; (2) the exact purpose of the original act, as Senator Edmunds described it, since I believe that bears importantly on how the act should be interpreted; and (3) whether this is a typical jurisdiction-granting act, with all the rigidity in application that that characterization implies.

In sum, it seems to me that the court reads the governing statute, § 1500, not as it is now written but as it was before the 1948 amendments, and as the court wishes it were today. The court imports into the act a rigid application that is not supported either by the legislative history or the original purpose. I believe that the interests of justice and our responsibility to apply the law as Congress has enacted it require otherwise.

I.

The first of the rules derived by the court from "the words, meaning, and intent of section 1500" is that "if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on." Maj. at 1021. As the court explains, "[b]y the plain language of section 1500, if the same claim is pending in another court when the plaintiff *files his complaint* in the Claims Court, there is no jurisdiction, period . . ." Maj. at 1021 (emphasis added).

In fact the statute says no such thing. The original 1868 statute began with the phrase ". . . no person *shall file* or prosecute any claim . . ." (emphasis added). However, in 1948 the statute was amended in several respects. One respect was to delete the *shall file or prosecute* language. The statute before us today states something quite different: "The Claims Court shall not have jurisdiction of any claim . . . which the plaintiff . . . *has pending* in any other court . . . "(emphasis added). Different words have different meanings; the question for the court is not what the statute once meant, but what it means now.

In the original panel opinion in this case, 911 F.2d 654 (Fed.Cir.1990), the panel majority discussed at length the question of the possible consequences of this change, and in particular the problem of determining the *when* implicitly referred to by the *has pending* phrase. We discussed the possible constructions that could be placed on that phrase given the history of the act, and the subsequent history of its interpretation by this court and its predecessor.

The court today by its 'plain language' interpretation ignores the obvious ambiguities the revised language created, and would have us believe that the amendments never happened, in fact or in law. It summarily overrules our prior precedents which struggled – not always successfully – to make sense of the statute. The explanation the court gives for the change made in 1948, and for the summary dismissal of its possible significance, is that it is a change "in phraseology" (quoting the 1948 revisions). That is an undeniable fact, but hardly dispositive of the interpretation question. It is after all the phraseology of the statute that gives us its meaning. I regret that I am unable to see the meaning of the words with the same clarity that the majority does.

The plain meaning rule, when applicable, has important structural effect beyond its rhetorical value. Honestly applied, it tells a court what *not* to look at – legislative debates, committee reports, newspaper commentary and other 'aids' to policy development; the meaning of the law is what the words of the

statute say it is. In cases in which a plain meaning exists, it is hard to quarrel with that construct.

This, however, is not a plain-meaning case. Here we have neither plain meaning – the statute as now written simply does not address *when* an earlier-filed case must be pending to invoke a § 1500 bar[1] – nor clear evidence of what the Congress intended on this issue. Certainly nothing in the statute now speaks of the *time of filing* of the complaint.

The majority suggests we may not find in a change in the wording of a statute any change in the meaning "unless an intent to make such changes is clearly expressed," citing the Supreme Court's opinion in *Fourco Glass*. But it was the very decision in *Fourco Glass* that this court recently held was overturned by a subsequent amendment to the venue statute, even tough there was a total absence of evidence of legislative intent to achieve that particular result. *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed.Cir.1990), *cert. denied* ___U.S.___, 111 S.Ct. 1315, 113 L.Ed.2d 248 (1991) (a change in the general definitions applicable to venue applies to the specific provisions for venue in patent infringement suits).

The answer to the conundrum posed by § 1500, thus, must be found by ferreting out its underlying policy and applying it to the situation before us. The Supreme Court has recently stated: "It is a well-settled canon of statutory construction that, where the language does not dictate an answer to the problem before the Court, 'we must analyze the policies underlying the statutory provision to determine its proper scope.' " *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 831 n. 7, 103 S.Ct. 1587, 1592 n. 7, 75 L.Ed.2d 580 (1983) (quoting *Rose v. Lundy*, 455 U.S.

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[1] In *Johns-Manville*, we determined that "the plain meaning of 'pending' includes cases which have been filed but stayed." 855 F.2d at 567. Unlike the present case, in *Johns-Manville* the earlier-filed action was never *not* pending, and so the plain meaning interpretation therein does not reach the question of "when" an action must be pending to invoke § 1500.

509, 517, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982)). The statement by Senator Edmunds, the sponsor of § 1500, explaining the purpose of the statute, is "an authoritative guide to the statute's construction." *Bowsher*, 460 U.S. at 832-33, 103 S.Ct. at 1593 (citing *North Haven Board of Education v. Bell*, 456 U.S. 512, 527, 102 S.Ct. 1912, 1921, 72 L.Ed.2d 299 (1982)).

The majority and I agree, in accord with Senator Edmunds' expressions, that the general purpose of § 1500 is to conserve the Government's limited resources. But Senator Edmunds in his statement is support of the bill made very clear the precise nature of the problem: there was a large class of persons who sued agents of the Government in suits around the country and then "after they put the Government to the expense *of beating them once in a court of law* they can turn around and try the whole question in the Court of Claims."[2] (Emphasis added.) And as we said in *Johns-Manville*, "[t]he remaining legislative history is devoid of any evidence indicating the legislature's intended purpose of section 1500." 855 F.2d at 1561.

We have then a statute which is less than clear on its face, and the purpose for which must be gleaned from a very limited legislative record. When there are alternative constuctions of a statute, it is the court's duty "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *FBI v. Abramson*,

[2] See 81 Cong.Globe, 40th Cong., 2d Sess. 2769 (1868). *Accord, Connecticut Dept. of Children & Youth Serv. v. United States*, 16 Cl.Ct. 102, 104 (1989): "Section 1500 clearly precludes the Claims Court's exercise of jurisdiction over proceedings with similar claims against the United States that were filed previously and remain pending in other courts. The section was enacted over a century ago to avoid the maintenance of suits against the United States in the Court of Claims after a claimant failed to receive satisfaction from suit against the United States elsewhere. At that time a judgment in another court had no res judicata effect in a subsequent suit against the United States in the Court of Claims. [Citation omitted]. The legislative history and cases indicate that section 1500 was created for the benefit of the sovereign and was

(Footnote continued)

456 U.S. 615, 625 n.7, 102 S.Ct. 2054, 2061 n. 7, 72 L.Ed.2d 376 (1982) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 338, 1 L.Ed.2d 331 (1957).

An important purpose, then, of the act – and one that presumably remains important – is to conserve Government resources. In order to achieve this purpose, the Government contends that § 1500 is a *jurisdictional* statute – like the diversity jursidiction statute – and that like other jurisdictional statutes, the jurisdictional determination must be made by looking to the existence or non-existence of jurisdiction at the time a complaint is filed. Appellants, on the other hand, argue that if there are no other suits pending at the time the Claims Court considers a § 1500 motion, then Claims Court jurisdiction is not barred; since the purpose of § 1500 is to relieve the United States from defending the same claims in two courts *at the same time*, that purpose would only be subverted if a claimant had another claim *presently* pending in another court, not *formerly* pending.

While the Government's theory has a bright-line advantage, it fails in two respects. First, the conclusion that § 1500 is jurisdictional in the usual sense does not withstand analysis. The purpose behind *jurisdictional* statutes, for example the diversity jurisdiction statute, 28 U.S.C. 1332 (1988), or for example the statute that authorizes this court to hear this appeal from the Claims Court, 28 U.S.C. § 1295 (a)(3) (1988), is to create jurisdiction in a federal court where none would otherwise exist, i.e. no subject matter jurisdiction.

The purpose behind § 1500, on the other hand, is to save the Government from having to defend the same suit in two different courts at the same time. Section 1500 *takes away*

intended to force an election when both forums could grant the same relief, arising from the same operable facts. *Johns-Manville v. United States*, 855 F.2d 1556, 1564 (Fed.Cir.1988). *The current purpose served by this section is to relieve the United States from defending the same case in two courts at the same time. Id.* at 1562; *Dwyer* [*v. U.S.*] 7 Cl.Ct. [565] at 567 [(1985)]." (Emphasis added.)

jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court. Operationally these two statutes focus on different issues. The former says, 'ordinarily your subject matter cannot be here, but if you satisfy the requirements of this statute, then you may *go ahead and proceed* in federal court.' The latter says, 'though your subject matter may appropriately be here in the Claims Court, if you come within the proscriptions of this statute, then you *may no longer proceed here*.'

Second, the Government's theory fails because it too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind § 1500. The facts of the present case offer a good example. UNR had third-party complaints against the Government pending in federal district court. Unsure of whether the district court had jurisdiction, and facing a running of the statute of limitations, UNR filed the same claim in the Claims Court. More than two years before the Claims Court entertained and acted on the Government's § 1500 motion to dismiss, the district court dismissed UNR's third-party complaints for lack of jurisdiction.[3] By the time the Claims Court entertained and acted on the Government's § 1500 motion, UNR had no earlier-filed suits pending and had yet to have its day in court. I believe the statute was not intended to operate to preclude UNR from having its day.

The Government warns that any interpretation of § 1500 that varies its focus from the time of filing will unduly burden the United States by forcing it to defend an earlier-filed district court complaint and a Claims Court complaint on the same basic claim at the same time, and would in effect give a plaintiff 'two bites at the apple.' The Government further warns that such

[3] The majority opinion observes that appellants' complaints based on the Federal Tort Claims Act and Little Tucker Act were dismissed on the merits with prejudice; but the other counts in the complaints were dismissed for lack of subject matter jurisdiction.

interpretation will require the Claims Court to undertake a burdensome analysis to determine whether the earlier-filed suit is pending.

The rule I would favor, however, does not fuel these worries. Claimants are entitled to a day in court. That does not mean, however, that a claimant is entitled to tie up Government resources by forcing it to simultaneously defend itself in two courts. If an earlier-filed action is finally dismissed other than on the merits before the Claims Court entertains and acts on the jurisdictional question, then the Claims Court action will be the only suit pending and the plaintiff will have but one day in court.[4]

If at the time the Claims Court entertains and acts on the jurisdictional question the earlier-filed action is still pending, i.e. not finally dismissed, then § 1500 will bar jurisdiction. Plaintiff will then have to proceed with the earlier-filed action, or come back to the Claims Court, if a statute of repose does not prevent, should its district court action be dismissed. The determination that the Claims Court must make is straightforward. Under this rule it is not possible for a plaintiff to prosecute an action both in the Claims Court and in another court at the same time. This is what § 1500 precludes.

I would adhere then to the rule announced in the original panel opinion: when an earlier-filed district court case is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction even though the dismissal may have occurred after the filing of the Claims Court action. This is an alternative reading of an ambiguous statutory phrase, and produces a result that comports more nearly with the purpose of the original act and with the dictates of fairness.

[4] Obviously, if an earlier-filed suit is carried through to final adjudication on the merits and is thus no longer pending at the time the Claims Court considers § 1500 jurisdiction, the action would be subject to *res judicata* principles.

II.

The second rule the court announces today is that "if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction . . ." Maj. at 1021. While the first rule the court derived, discussed above, is at least arguably an interpretation that the statute supports, this rule is without any support in the language of the statute, and inconsistent with the majority's first rule.

The statute speaks only to whether the Claims Court has jurisdiction *when the same claim is pending in another court;* nothing whatever is said about a claim that is *not* pending at the time that 'pendingness' is tested. If the majority believes, as we are told, that 'pendingness' is tested at the time the complaint is filed in the Claims Court – that the 'jurisdictional' determination must be made at the time the complaint is filed – then it is at that point that jurisdiction attaches or not. Nowhere does the statute go on to say that jurisdiction, once attached, shall be divested.

Again, the original statute enacted in 1868 had such language – it proscribed both filing and *prosecuting* any claim, in the then-Court of Claims, when the same claim was pending in another court. But again, subsequent amendments to the statute removed that language; the statute no longer contains a proscription against *prosecuting* a claim. And again, the court reads the statute as it once was, and as it wishes it were today.

Furthermore, to reach this result the court implicitly concedes a point it earlier denies – 'jurisdiction' under § 1500 turns out not to be, as we are told, a one-time absolute determined at the moment of filing. The Claims Court can have jurisdiction under § 1500 – no claim having been filed in another court – and years later lose jurisdiction because of § 1500 – a claim having been filed at that later time in some other court. Under the second rule, then, 'jurisdiction' comes and goes, depending on subsequent events. While admittedly the concept of jurisdiction is

a slippery one, this ephemeral quality is unusual if not unique among jurisdictional statutes generally.[5] In any event, the court's first and second rules stand on basically inconsistent grounds.

III.

The third rule announced by the court is that "if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply." Maj. at 1021. This rule is consistent with the broad interpretation placed on the term 'claim' by our precedents, and today reaffirmed by the court. By itself, that interpretation and the rule here announced is not exceptional. When coupled with the application of 'has pending,' as in the first rule, so as to deprive litigants of their day in court, I do not believe that is what Congress intended by this legislation.

Chief Judge Nies would seem to agree. In her separate opinion she suggests that the solution is 'equitable tolling' of any applicable limitations statute that the Government might otherwise invoke. That is a creative alternative, and would accomplish much the same result as the rule I suggest – in effect, it would permit a litigant to learn whether its cause of action properly can be brought in a district court and, if not, still pursue a remedy against the Government in the Claims Court without fear of being barred by the delays inherent in getting that first decision.

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[5] This second rule is dictum, since none of the claims before the court in these cases arose out of this second fact pattern; they were all cases of filings first in the district courts, and only later in the Claims Court. When a factual issue is not presented to the court, there is no "case or controversy," U.S. Const. Art. III § 2. There is a question whether constitutional authority exists to bind future courts to this second rule. *See 1B Moore's Federal Practice* ¶ 0.402[2], p. 40.

IV.

Congress presumably could have immunized the Federal Government from any liability for its asbestos-related activities; it did not. By general law, Congress has provided the citizens of this country an opportunity to fairly litigate their claims against the United States in the courts of the land. These plaintiffs, through no fault of their own, have not had that opportunity. I do not know whether the Government did anything that would make it liable under the law to these plaintiffs, but I do believe that § 1500 was not intended to deny them the opportunity to find out, and therefore I respectfully dissent.

APPENDIX B

UNR INDUSTRIES, INC., Unarco Industries, Inc. and Eagle-Picher Industries, Inc., Plaintiffs-Appellants,

v.

The UNITED STATES, Defendant-Appellee.

KEENE CORPORATION, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

Nos. 89-1638, 89-1639 and 89-1648.

United States Court of Appeals, Federal Circuit.

Jan. 24, 1991.

Appealed from U.S. Claims Court; Christine Cook Nettesheim, Judge.

Joe G. Hollingsworth, Spriggs & Hollingsworth, Washington, D.C., argued, for plaintiffs-appellants in Nos. 89-1638, 89-1639. With him on the brief, was William J. Spriggs. Also on the brief, were Paul G. Gaston and Catherine R. Baumer. Paul C. Warnke, Clifford & Warnke, Washington, D.C., was on the brief, for plaintiff-appellant in No. 89-1648. With him on the brief, were Harold D. Murray, Jr. and Philip H. Hecht. Also on the brief, were John E. Kidd, Anderson Kill Olick & Oshinsky, P.C., New York City and Lauren B. Homer, Anderson Kill Olick & Oshinsky, P.C., Washington, D.C.

David S. Fishback, Sr. Trial Counsel, Dept. of Justice, Washington, D.C., argued, for defendant-appellee. With him on the brief, were Stuart M. Gerson, Asst. Atty. Gen., J. Patrick Glynn, Director, Harold J. Engel, Deputy Director and Douglas C. Page, Trial Atty. Also Robert M. Loeb and Barbara C.

Biddle, Dept. of Justice, Washington, D.C., were on the Petition for Rehearing and Suggestion for Rehearing In Banc.

ORDER

On December 18, 1990, this court issued an order accepting the suggestion of Defendant-Appellee (Government) for rehearing in banc. We vacated the panel's judgment of July 30, 1990 and withdrew the accompanying opinion. The order further stated that "[a]dditional briefing and argument are under consideration." On January 4, 1991, Plaintiffs-Appellants filed a motion requesting opportunity for additional briefing and argument. On January 7, 1991, the Government filed a response, taking no position on the question of whether the court should entertain further briefing and argument.

In January 3, 1991, GAF Corporation moved for leave to file a brief as *Amicus Curiae*. In its January 7, 1991 response, the Government indicated it had no objection to the granting of GAF's motion so long as further briefing by the actual parties to the case is allowed.

After consideration of all the facts and circumstances, it is ORDERED that:

1) Plaintiffs-Appellants' motion for further briefing and argument is granted, subject to the terms of this Order.

2) GAF Corporation's motion for leave to file a brief as *Amicus Curiae* is granted.

3) Briefing and argument shall be addressed to the following issues (and may include related and subsidiary issues):

a) Whether the term "has pending" as used in 28 U.S.C. § 1500 (1988) can be properly construed to mean pending at the time the Claims Court first entertains and acts on a Government motion to dismiss (or its equivalent), regardless of when the Claims Court suit was actually filed; or whether the term "has pending" is properly construed to mean pending at the time when the Claims Court suit was filed;

b) Whether the case of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965) *cert. denied*, 382 U.S. 976, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) should be overruled;

c) Whether a petition for writ of *certiorari* is a "suit or process against the United States" as that phrase is used in § 1500;

d) Whether the rule announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), for determining what is a claim under § 1500 should be reconsidered, and if so, what should be the proper rule.

4) Briefing shall be accomplished in accordance with the following schedule:

a) Plaintiffs-Appellants shall serve and file their initial rehearing brief within 40 days of the date of this ORDER;

b) Defendant-Appellee shall serve and file its initial rehearing brief within 30 days after service of the brief of the Plaintiffs-Appellants;

c) Plaintiffs-Appellants may serve and file a reply brief within 14 days after service of the brief of the Defendant-Appellee, but a reply brief must be filed at least 3 days before oral argument. Fed.Cir.R. 31 Practice Note shall apply.

d) GAF Corporation may serve and file a brief as *Amicus Curiae* in accordance with Fed.R.App.P. 29.

APPENDIX C

C-1

UNR INDUSTRIES, INC., Unarco Industries, Inc. and Eagle-Picher Industries, Inc., Plaintiffs-Appellants,

v.

The UNITED STATES, Defendant-Appellee.

KEENE CORPORATION, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

Nos. 89-1638, 89-1639 and 89-1648.

United States Court of Appeals, Federal Circuit.

Dec. 18, 1990.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, accepted. The judgment entered on July 30, 1990, 911 F.2d 654, is VACATED, and the accompanying opinion is withdrawn. Additional briefing and argument are under consideration.

APPENDIX D

UNR INDUSTRIES, INC., Unarco Industries, Inc. and Eagle-Picher Industries, Inc., Plaintiffs-Appellants,

v.

The UNITED STATES,
Defendant-Appellee.

KEENE CORPORATION,
Plaintiff-Appellant,
v.
UNITED STATES, Defendant-Appellee.
Nos. 89-1638, 89-1639 and 89-1648.

United States Court of Appeals,
Federal Circuit.

July 30, 1990.

Joe G. Hollingsworth, Spriggs & Hollingsworth, Washington, D.C., argued, for plaintiffs-appellants in nos. 89-1638, 89-1639. With him on the brief was William J. Spriggs, Washington, D.C. Also on the brief were Paul G. Gaston and Catherine R. Baumer, Washington, D.C. Paul C. Warnke, Clifford & Warnke, Washington, D.C., was on the brief, for plaintiff-appellant in no. 89-1648. With him on the brief were Harold D. Murray, Jr. and Philip H. Hecht, Washington, D.C. Also on the brief were John E. Kidd, Anderson Kill Olick & Oshinsky, P.C. New York City, and Lauren B. Homer, Anderson Kill Olick & Oshinsky, P.C., Washington, D.C.

David S. Fishback, Sr. Trial Counsel, Dept. of Justice, Washington, D.C. argued, for defendant-appellee. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., J. Patrick Glynn, Director, Harold J. Engel, Deputy Director and Douglas C. Page, Trial Atty., Washington, D.C.

Before RICH, MAYER and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

This appeal is another chapter in the long-fought battle to determine responsibility for injuries sustained over the years by individuals working with asbestos. In these particular cases, plaintiff companies seek indemnification from the United States Government for the companies' liabilities to shipyard workers for injuries caused by exposure to asbestos. Before us is an appeal from an order of the United States Claims Court (Nettesheim, J.) entered June 1, 1989, and reported as *Keene Corp. v. United States*, 17 Cl.Ct. 146 (1989). The United States moved in the trial court to dismiss eight suits[1] brought by Keene Corporation, Eagle-Picher Industries, UNR Industries, Fibreboard Corporation, H.K. Porter Company, Inc., Raymark Industries, Inc. and GAF Corporation.[2] The trial court granted the motion as to all plaintiffs except GAF Corporation.[3] Keene Corporation (Keene), Eagle-Picher Industries (E-P), and UNR Industries (UNR) all appealed pursuant to 28 U.S.C. § 1295(a)(3) (1988). E-P and UNR appealed jointly, and their appeal was consolidated with Keene's appeal for purposes of oral argument.[4]

The trial judge's decision was based on her reading of a statute, 28 U.S.C. § 1500, that pertains to the Claims Court's jurisdiction. The judge believed the statute denied the court jurisdiction, and obligated her to grant the Government's motion to dismiss. We believe the statute does not so dictate, and for that reason we reverse and remand for further proceedings consistent with this opinion.

I.

Much of the background of the present case is detailed in the trial court's opinion, *Keene Corp.*, *supra*, and need not be recited here. In short, the present appeals raise the question of the proper

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[1] Nos. 579-79C, 585-81C, 170-83C, 16-84C, 514-84C, 515-85C, 12-88C and 287-83C.

[2] Keene Corporation had two actions pending in the Claims Court. The other plaintiffs each had one case pending.

[3] *Keene Corp. v. United States*, 17 Cl.Ct. at 160.

[4] The Government filed a single brief in response to the Keene and UNR/E-P briefs.

application of 28 U.S.C. § 1500 (1988) to each of these cases. Section 1500 was enacted in 1868, and was most recently before us in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988) (per curiam), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), *aff'g Keene Corp. v. United States* 12 Cl.Ct. 197 (1987). The statute deals with the jurisdiction of the Claims Court, and bars that court from hearing claims when, under the terms of the statute, those claims are pending in other courts:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States

In the *Johns-Manville* case two issues involving the interpretation of § 1500 were addressed. First, the Claims Court had applied the statute to bar the plaintiffs' suit on the grounds that there were pending district court cases raising the same claims. On appeal plaintiffs argued that since their third-party district court suits against the Government were based on different theories of relief than their direct action Claims Court suits, they were different "claims" and thus not subject to the § 1500 bar. This Court held otherwise (thereby affirming the Claims Court), concluding that the term "claim" is defined by the operative facts alleged, not the legal theories raised.

For example, the fact that one set of operative facts may create liability both in tort and contract does not mean that a recital of such facts states two separate and distinct "claims" as that term is used in § 1500. We explained that this construction of the term "claim" serves the underlying purpose of § 1500, which is "to prohibit the filing and prosecution of the same claim against the United States in two courts at the same time." *Johns-Manville* at 1562.

The second issue addressed by this Court is whether third-party complaint cases that are stayed in the district court are

"pending" within the terms of § 1500. We held, based on a plain meaning interpretation of the statute, that " 'pending' includes cases which have been filed but stayed." *Johns-Manville* at 1567.

The case now before us raises a third issue regarding the meaning of § 1500. In the present action, on November 16, 1988, with the *Johns-Manville* case in hand, the Government moved for summary judgment against the seven parties involved at the trial level. The Government asserted that at the time of filing in the Claims Court, each plaintiff had one or more suits pending in another court. Proceedings on the Government's motion were stayed while the appellants in the *Johns-Manville* case sought certiorari in the Supreme Court. The Supreme Court declined further review. *Keene Corp. v. United States*, ___ U.S. ___, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989).

Thereafter, on June 1, 1989, the Claims Court granted the Government's summary judgment based on lack of jurisdiction. *Keene Corp. v. United States*, 17 Cl.Ct. 146. With the exception of GAF Corporation, the Claims Court determined that each plaintiff had an earlier-filed suit that involved the same claim, i.e. same operative facts, as that in the Claims Court action, and that those earlier-filed suits were "pending" at the time the Claims Court suit was filed.

Keene, UNR, and E-P appealed to this court, arguing that the phrase "has pending" does not mean pending at the time the Claims Court action is *filed*. They contend that § 1500 should not bar jurisdiction if the earlier-filed suit, though still pending at the time the Claims Court action is filed, is dismissed before the Claims Court entertains the § 1500 motion to dismiss. Keene further argues that in its case, the earlier-filed suit does not involve the same operative facts as its Claims Court suit and that, however, the issue of "has pending" is resolved, § 1500 thus does not bar Claims Court jurisdiction. In view of our disposition of the jurisdiction issue, we need not address this additional issue.

II.

A. *Earlier-Filed Suits In The District Courts*

1. UNR Industries

In re All Maine Asbestos Litigation, Master Asbestos Docket, filed July 21, 1982), is an omnibus consolidation of 225 suits brought by present or former shipyard workers or their representatives seeking recourse for injury due to exposure to asbestos manufactured or supplied by the many named defendants. UNR is one of those defendants. The defendant manufacturers and suppliers, in turn, filed third-party actions for contribution or indemnification against the United States. These third-party suits were initiated in two different complaints, Model Third-Party Complaint Against the United States of America "A" ("Model Third-Party Complaint A") and Model Third-Party Complaint Against the United States of America "B" ("Model Third-Party Complaint B"). *Keene Corp.*, 17 Cl.Ct. at 149-50.

Eventually, all of the claims of the Model Third-Party Complaints A and B were dismissed. While the claims within each Model Third-Party Complaint were not all dismissed at the same time, for purposes of this opinion it is sufficient to note that by March 12, 1987, all of the claims of the Model Third-Party Complaint A were dismissed, *In re All Maine Asbestos Litigation (BIW Cases)*, 655 F.Supp. 1169, 1171 (D.Me.1987),[5] and that by July 16, 1986, all of the claims of the Model Third-Party Complaint B were dismissed.[6] *In re All Main Asbestos Litigation (PNS Cases)*, Master Asbestos Docket (D.Me., July 16, 1986).[7]

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[5] The dismissals of the claims of the Model Third-Party Complaint A were affirmed on July 20, 1988 in *In re All Maine Asbestos Litigation (BIW Cases)*, 854 F.2d 1328 (Fed.Cir.1988).

[6] UNR and E-P do not contest that their earlier-filed suits involve the same operative facts as their Claims Court suits.

[7] UNR noted in its brief that it filed for bankruptcy shortly after the Model Complaint filings and successfully secured a stay of all proceedings in the third-party actions, and that the dismissals thus, technically, did not apply to it. However, this is of no import since UNR voluntarily dismissed all of its Model Complaint actions on October 20, 1988, which is after UNR filed its Claims Court action but before the Claims Court entertained the Government's motion to dismiss.

2. Eagle-Picher Industries

a. *In re All Maine Asbestos Litigation*, Master Asbestos Docket (D.Me., filed July 21, 1982)

E-P's involvement in *In re All Maine Asbestos Litigation* is similar to that of UNR. Thus all of E-P's third-party complaints against the Government, filed on July 21, 1982, were dismissed no later than March 12, 1987. *Keene Corp.*, 17 Cl.Ct. at 149-50.

b. *Albert Lopez, et al v. Eagle-Picher Industries, Inc. v. United States*, No. C-84-155M (W.D. Wash., filed Feb. 3, 1983)

On February 3, 1983, E-P filed in the District Court for the Western District of Washington ten third-party complaints against the United States seeking indemnification for its liabilities resulting from asbestos-related injuries that its employees allegedly sustained while employed at the Puget Sound Naval shipyard. The case *Albert Lopez, et al v. Eagle-Picher Industries, Inc. v. United States*, No. C-84-155M (W.D. Wash., filed Feb. 3, 1983) ("*Lopez*"), was treated as a test case; E-P's third-party complaint was dismissed on May 19, 1986 for failure to state a claim.[8] *Lopez v. Johns Manville*, 649 F.Supp. 149 (W.D.Wash.1986). The remaining nine third-party complaints were dismissed on June 30, 1986. *Keene Corp.*, 17 Cl.Ct. at 152.

3. Keene Corporation

a. *Miller v. Johns-Manville Bldg. Prod., et al*, No. 78-1283E (W.D.Pa., filed June 1, 1979)

In this action ("*Miller*"), the personal representative of the estate of a laborer allegedly injured in 1943 from asbestos exposure sought damages from nine asbestos suppliers, including Keene Building Products. Keene's insurance company, in turn, initiated a third-party action against the United States and Celotex Corporation seeking contribution or indemnification for any resulting liabilities. *Keene Corp.*, 17 Cl.Ct. at 153. For

[8] The *Lopez* decision was affirmed *sub nom. Lopez v. A.C. & S., Inc.* 858 F.2d 712 (Fed.Cir.), *reh'g denied* (Nov. 21, 1988).

purposes of this opinion, it is accepted that this third-party complaint was dismissed on May 13, 1980.[9]

b. *Keene Corp. v. United States*, No. 80-CIV-0401 (GLG) (S.D.N.Y., filed Jan. 22, 1980)

This suit ("*Keene (SDNY)*") was a direct action by Keene against the Government seeking indemnification, contribution or apportionment for amounts that Keene spent or may spend in defending and settling thousands of asbestos-related personal injury actions. *Keene Corp.*, 17 Cl.Ct. at 154. The district court dismissed this suit on September 30, 1981 holding the pleadings inadequate to invoke Federal Tort Claims Act jurisdiction. *Keene Corp. v. United States*, No. 80-CIV-0401 (S.D.N.Y.), *aff'd*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

B. *Claims Court Suits*

1. UNR Industries

On January 16, 1984, UNR filed a direct action in the Claims Court, *UNR Industries, Inc.*, No. 16-84C, seeking damages from the Government for breach of express and implied asbestos-related contracts. *Keene Corp.*, 17 Cl.Ct. at 150-51.

2. Eagle-Picher Industries

On March 25, 1983, E-P filed a direct action in the Claims Court, *Eagle-Picher Industries, Inc.*, No. 170-83C, charging that the Government is contractually liable to E-P for the costs that E-P incurred in litigating and settling claims for asbestos-caused injuries. *Keene Corp.*, 17 Cl.Ct. at 150.

[9] Keene apparently contended before the trial court that it voluntarily dismissed its third-party complaint. The Claims Court, however, stated that "it is unclear whether the [district] court acted on Keene's motion voluntarily to dismiss its third-party complaint, [but Keene] accepts a dismissal date of May 13, 1980." *Keene Corp.*, 17 Cl.Ct. at 153.

3. Keene Corporation

a. *Keene I*

On December 21, 1979, Keene filed suit in the Court of Claims, *Keene Corp. v. United States*, No. 579-79C (amended petition filed May 1, 1981) ("*Keene I*"), charging the Government with breach of warranty in an asbestos-related contract. *Keene Corp.*, 17 Cl.Ct. at 153-54.

b. *Keene II*

On September 25, 1981, Keene filed a second suit in the Court of Claims, *Keene Corp. v. United States*, No. 585-81C ("*Keene II*"), alleging that the Government violated its fifth amendment rights by recouping from injured workers the payments that the Government made to those injured workers under the Federal Employees' Compensation Act ("FECA"). Keene argued that since it had paid compensation to the injured workers either through settlement agreements or because of judgments in favor of them, the recoupment by the Government of amounts that it has paid to injured workers under FECA is an unconstitutional taking of Keene's property without just compensation, because the injuries to the workers were caused by the Government's actions. Keene alleged that this taking further had the effect of increasing the amounts of judgments and settlements that Keene was required to pay and impaired its contract rights. *Keene Corp.*, 17 Cl.Ct. 154-55.

III.

The central question in this appeal is the meaning of § 1500; specifically, since the statute bars Claims Court jurisdiction when there is a "pending" claim in another court, the issue is, pending *when*? In the art of statutory construction, there are as many formulations of how to do it as there are those doing it. The Supreme Court devotes considerable print to this[10]; the law

[10] *See, e.g., Dole v. United Steelworkers of Am.*, ___ U.S. ___, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990) (White, J., and Rehnquist, C.J., dissenting); *Sullivan v. Everhart*, ___ U.S. ___, 110 S.Ct. 960, 108 L.Ed.2d 72 (1990) (Stevens, Brennan, Marshall and Kennedy, J.J., dissenting); *Blanchard v. Bergeron*, 489 *(Footnote continued)*

review commentators have made this one of the hot topics in current legal learning.[11]

A reading of some of the literature would seem to suggest that there was a time when the courts, in the exercise of their independent judgment, treated a statute as Vladimir Ashkenazy plays Tchaikovsky – a vehicle for expressing one's own creativity. However that may be, today there is widespread agreement that the courts have a responsibility, perhaps a constitutional duty, to implement the will of the Congress as expressed in the enacted legislation. Toward that end, courts have moved away from the traditional recitation of constructional rules – rules that lend themselves to post-hoc rationalization – and toward structural constraints on judicial readings.

[1] The point of beginning, then, is the statute. We first look to the statute for any express definitions of the key term or terms, and if none are found, then to see whether the terms can fairly be said to have a plain, non-ambiguous, meaning. The key phrase in our case is "has pending." A reading of § 1500 reveals that the statute offers no express definition of the phrase. As to the plain meaning of the term "pending," *Black's Law Dictionary* 1021 (5th Ed.1979) defines it as "[b]egun, but not yet completed; during; before the conclusion of ...." *Webster's Third New International Dictionary* (1986) defines "pending" as "not yet decided: in continuance: in suspense...." These definition support a conclusion that if a case is finally dismissed, either voluntarily or for lack of jurisdiction, prior to the relevant time for determining "pendingness," it is no longer "pending." That is,

U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring).

[11] See, *e.g.*, Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan.L.Rev. 321 (1990); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281 (1989); Posner, *Legislation and Its Interpretation: A Primer*, 68 Neb.L.Rev. 432 (1989); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S.Cal.L.Rev. 541 (1988); Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U.Pitt.L.Rev. 691 (1987).

a finally dismissed action is "complete" or "concluded" from the perspective of the dismissing court. This plain meaning of the term "pending" does not, however, answer the question, *when* do we decide "pendingness"—when must a claim be pending to invoke the jurisdictional bar of § 1500. Regrettably, the legislative history of § 1500 fails to shed much ligh' on this issue.

Section 1500 is a relatively ancient statute, and the legislative history concerning it is limited. As originally enacted in 1868, what is now 28 U.S.C. § 1500 read:

> Sec. 8. *And be it further enacted* (italics in original), That no person *shall file* or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Act of June 25, 1868, 15 Stat. 77 (emphasis added). The language in this original version of the statute is plain concerning our issue: the relevant time for determining the existence of a § 1500 bar is at the time the Claims Court suit is filed or prosecuted.

In 1868, an adjudication of a district court claim against an agent or officer of the Unite[illegible]tates had no res judicata effect on a judgment in a subsequent Court of Claims suit against the United States itself based on the same operative facts. *See* Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 576-78 (1967) (citing *Matson Nav. Co. v. United States*, 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932)).

Senator Edmunds, the author of the bill that became Section 8 of the Act of June 25, 1868, explained:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits *that are now pending*, scattered over the country here and there, and *who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims.* The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (emphasis added). Thus, concerning sequential suits on the same operative facts in different courts against different plaintiffs, § 1500 was the means for achieving the same result as that provided by the doctrine of res judicata.

Senator Edmunds' statement that "[t]he object [of § 1500] is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts" would seem to be aimed at claimants with actions being prosecuted at the same time in both the Court of Claims and the district courts. Despite the plain language of the original statutory text, this statement indicates that Senator Edmunds believed that, under the statute, jurisdiction for purposes of prosecuting a claim could be settled sometime *after* a Court of Claims suit was filed, that is, while both suits were pending. Alternatively, this statement could have been made merely in reference to the part of the original statute that afforded the litigants thirty days from passage of the act during which plaintiffs could dismiss their other actions and preserve their Court of Claims jurisdiction. This explanation would make Senator Edmunds' statements consistent with the plain meaning of the statute.

To a large extent, Senator Edmunds' concerns have become moot. Today, § 1500 is rarely used as originally envisioned. Section 1500 was enacted to deal with a specific concern over a

rapid increase in the volume of complicated cotton claims cases, resulting from land seizures during the Civil War, involving suits both in the Court of Claims against the Government and in the district courts against the Secretary of the Treasury or his agents. Schwartz, 55 Geo. L.J. at 574-577. Without the force of § 1500, a full adjudication of the merits of the same claim, with differing results, could be realized in the two different courts. Today, while there may exist some situations in which a claimant may sue an officer or agent of the Government (in his/her official capacity) separate from the Government, there does not appear to exist the wholesale problem that the Government experienced in 1868.

Certainly, to the extent cases do arise where the same claim is otherwise allowably brought against an agent or officer of the Government and the Government itself, § 1500 may still be necessary to serve the function of a res judicata statute,[12] as originally envisioned. However, in the past 42 years[13], the Government has invoked § 1500 in at most only three single instances to bar Claims Court jurisdiction where the same claim had previously been filed against an agent or officer of the Government in district court.[14] In most of the cases arising under

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[12] Schwartz calls for application of the rule of res judicata as between suits against agents or officers of the Government and the Government itself, noting that authority already exists providing such a rule in some instances and that policy otherwise favors it. *See* Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 599-601 (1967). Further, Schwartz notes that "[i]n modern times the legislature may terminate the common-law remedy against the government officer when a remedy against the United States is provided." *Id.* at 578 n. 26.

[13] § 1500 has been in its present form since 1948. As will be discussed, in 1948 § 1500 was broadened to prohibit Claims Court jurisdiction when the Government itself is a defendant in the earlier-filed action. *See infra* text following note 18.

[14] *See Hill* v. *United States*, 8 Cl.Ct. 382 (1985); *Brinker-Johnson Co.* v. *United States*, 144 Ct.Cl. 489 (1961); *National Cored Forgings Co.* v. *United States*, 132 F.Supp. 454 (1955). *See also Maguire Indus., Inc.* v. *United States*, 86 F.Supp. 905, 114 Ct.Cl. 687 (1949), *cert. denied*, 340 U.S. 809, 71 S.Ct. 36, 95 L.Ed. 595 (1950) (the earlier-filed action was in a tax court).

§ 1500, the Government uses § 1500 to bar Claims Court jurisdiction where the Government itself is the sole defendant in both the co-pending Claims Court and district court actions, and an agent or officer of the Government as such is not a named defendant. And it is out of these types of cases that the issue before us today arises – a type of case unknown to the framers of § 1500.[15]

[2,3] Yet, in actions against the Government in which the district courts and the Claims Court have concurrent jurisdiction,[16] the doctrine of res judicata will protect the government from having to defend itself on the merits against a second claim brought by the same party sequentially on the same legal theories in both courts. Similarly, res judicata will protect the Government against second suits in those actions of which the district courts and the Claims Court have exclusive jurisdiction because of different legal theories or causes of action,[17] but where the actions, though based on different legal theories, involve the same set of operative facts. Today, the intended res judicata effect of the original statute is necessary only in a quite limited set of circumstances, and thus § 1500 for these purposes has been rightly criticized as an anachronism.[18]

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[15] Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 580 (1967) ("Successive suits against the United States in different courts were not known to the framers of the statute, since in 1868 only the Court of Claims had jurisdiction of suits against the United States. The doctrine of sovereign immunity and the consent by Congress to suit as provided only in the Court of Claims acts constituted a prohibition of the jurisdiction over such suits in all other courts.")

[16] *See* 28 U.S.C. § 1346(a) (1988).

[17] *See* 28 U.S.C. §§ 1346(b)-(f) (1988) (exclusive district court jurisdiction of actions against the government), *and see* 28 U.S.C. §§ 1491-1509 (1988) (Claims Court jurisdiction of actions against the government).

[18] *See National Union Fire Ins. Co.* v. *United States*, 19 Cl.Ct. 188, 190 (1989); *Keene Corp.* v. *United States*, 12 Cl.Ct. 197, 205 (1987); *Dwyer* v. *United States*, 7 Cl.Ct. 565, 567 (1985); *A.C. Seeman, Inc.* v. *United States*, 5 Cl.Ct. 386, 389 (1984); and Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573 (1967).

Between its enactment in 1868 and 1948, several changes were made in the statute, mostly minor, and with little indication of legislative intent in regards to the phrase "has pending." In 1874, a few changes, none affecting this issue, were made in the phraseology of section 8 of the Act of June 25, 1868 as that section was incorporated in the Revised Statutes of 1874, section 1067. The changes in phraseology were not meant to change the meaning of the statute. Remarks of Representative Butler, 2 Cong. Rec., 43d Cong., 1st Sess. 129 (1873). Section 1067 of the Revised Statutes of 1874 was later adopted without change as section 154 of the Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138.

However, in 1948 Congress changed the language of the statute in two ways. First, the language was changed to include suits pending against the United States as well as suits pending against agents of the United States. Act of June 25, 1948, ch. 646, 62 Stat. 942. It can be presumed that this change reflected that district courts by then had jurisdiction over some claims against the United States. *See* 28 U.S.C. § 1346. Second, and more importantly, Congress also changed the language at the beginning of the statute from "No person *shall file or prosecute* in the Court of Claims, or in the Supreme Court on appeal therefrom ..." to "The Court of Claims *shall not have jurisdiction* of ...." (Emphasis added). The effect of this change was to eliminate a key phrase – the "shall file" language. However, the legislative history is silent on the reason for the change, other than the statement that "[c]hanges were made in phraseology." Act of June 25, 1948, ch. 646, 62 Stat. 942. Finally, in 1982, with the establishment of the Claims Court, § 1500 was amended to apply its terms to that court. 28 U.S.C. § 1500 (1988).

The plain meaning rule, although often lumped with other rules for statutory construction, also has important structural effect beyond its rhetorical value. Honestly applied, it tells a court what *not* to look at – legislative debates, committee reports, newspaper commentary and other "aids" to policy development. The meaning of the law is what the words say

it is. In cases in which a plain meaning exists, it is hard to quarrel with that construct.[19] This, however, is not such a case.

Here we have neither plain meaning – the statute simply does not address *when* an earlier-filed case must be pending to invoke a § 1500 bar[20] – nor clear evidence of what the Congress intended on this issue. Compare, for example, our recent decision in *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210 (Fed.Cir.1990), a case involving a similar unexplained language change – between the time the draft version went to conference committee and the time it was finally enacted – in a Congressional act governing federal court jurisdiction. The original language in both the House and Senate versions stated that judicial review under the particular statute at issue was to be "only" in the District Court for the District of Columbia, but the word "only" was deleted in the final enacted version. 30 U.S.C. § 1276 (a) (1982). We held that even without the word "only" the plain meaning was clear: "... it appears from the plain meaning of the language in section 1276(a)(1) that Congress intended the District Court for the District of Columbia to be the exclusive forum ... [and] nothing in the legislative history indicates that Congress intended an interpretation contrary to the plain meaning of these words." *Amerikohl Mining, Inc.*, 899 F.2d at 1213. We declined to speculate about why the word "only" was removed, and applied the law as written.

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[19] *But see FBI v. Abramson*, 456 U.S. 615, 625 n. 7, 102 S.Ct. 2054, 2061 n. 7, 72 L.Ed.2d 376 (1982) (Blackmun and Brennan, JJ., and O'Connor and Marshall, J.J., dissenting in separate opinions) (citing *United States v. Monia*, 317 U.S. 424, 431, 63 S.Ct. 409, 412, 87 L.Ed. 376 (1943) (Frankfurter, J., dissenting)) (" 'The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.' ").

[20] In *Johns-Manville*, we determined that "the plain meaning of 'pending' includes cases which have been filed but stayed." 855 F.2d at 1567. Unlike the present case, in *Johns-Manville* the earlier-filed action was never *not* pending, and so the plain meaning interpretation therein does not reach the question of "when" an action must be pending to invoke § 1500.

As we have noted, the language that remains in § 1500 after the 1948 revision does not provide us with a plain answer to the question. And as we said in *Johns-Manville*, "[t]he remaining legislative history is devoid of any evidence indicating the legislature's intended purpose of section 1500." 855 F.2d at 1561. As in *Amerikohl*, we will not attempt to extrapolate the Congress' intent in changing the language of the statute; however, unlike in that case, we do not have a plain meaning.

IV.

The answer to the conundrum posed by § 1500, thus, must be found by ferreting out its underlying policy and applying it to the situation before us. The Supreme Court has recently stated: "It is a well-settled canon of statutory construction that, where the language does not dictate an answer to the problem before the Court, 'we must analyze the policies underlying the statutory provision to determine its proper scope.' " *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 831 n. 7, 103 S.Ct. 1587, 1592 n. 7, 75 L.Ed.2d 580 (1983) (quoting *Rose v. Lundy*, 455 U.S. 509, 517, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)). The statement by Senator Edmund, the sponsor of § 1500, explaining the purpose of the statute, is "an authoritative guide to the statute's construction." *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 832-33, 103 S.Ct. 1587, 1592-93, 75 L.Ed.2d 580 (1983) (citing *North Haven Board of Education v. Bell*, 456 U.S. 512, 527, 102 S.Ct. 1912, 1921, 72 L.Ed.2d 299 (1982)).

Recently the Claims Court in a well-reasoned opinion reviewed the purpose of § 1500:

> Section 1500 clearly precludes the Claims Court's exercise of jurisdiction over proceedings with similar claims against the United States that were filed previously and remain pending in other courts. The section was enacted over a century ago to avoid the maintenance of suits against the United States in the Court of Claims after a claimant failed to receive satisfaction from suit against the United States elsewhere. At that time a judgment in another court had no res judicata effect in a subsequent suit against the United States in the Court of Claims. [Citation omitted]. The legislative history and cases indicate that section 1500 was created for the benefit of the sovereign and was intended to force an election when both forums could grant the same relief, arising from the same operable facts. *Johns-Manville v. United States*, 855 F.2d 1556, 1564 (Fed. Cir.1988). *The current purpose served by this section is to relieve the United States from defending the same case in two courts at the same time. Id.* at 1562; *Dwyer*, 7 Cl.Ct. at 567.

Connecticut Dept. of Children & Youth Serv. v. United States, 16 Cl.Ct. 102, 104 (1989) (emphasis added).

An important purpose, then, of § 1500 – and one that remains important – is to conserve Government resources. In order to achieve this purpose, the Government contends that § 1500 is a jurisdictional statute – like the diversity jurisdiction statute – and that like other jurisdictional statutes, the jurisdictional determination must be made by looking to the existence or nonexistence of jurisdiction at the time a complaint is filed. Appellants, on the other hand, argue that if there are no other suits pending at the time the Claims Court considers a § 1500 motion, then jurisdiction is not barred; since the purpose of § 1500 is to relieve the United States from defending the same claims in two courts *at the same time*, that purpose would only be subverted if a claimant had another claim *presently* pending in another court, not *formerly* pending.

Both parties agree generally, in accord with Senator Edmunds' expressions, that the purpose of § 1500 is to conserve the Government's limited resources. Both parties propose answers that would achieve that result. When there are two reasonable alternative constructions of a statute, it is the court's duty " 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.' " *FBI v. Abramson*, 456 U.S., 615, 625 n. 7, 102 S.Ct.

2054, 2061 n. 7, 72 L.Ed.2d 376 (1982) (Blackmun and Brennan, J.J., and O'Connor and Marshall, J.J., dissenting in separate opinions) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 338, 1 L.Ed.2d 331 (1957)).

[4,5] While the Government's theory has a bright-line advantage, it fails in two respects. First, the analogy of the diversity jurisdiction statute to § 1500 does not withstand analysis. The purpose behind the diversity jurisdiction statute, 28 U.S.C. 1332 (1988), is to insure an impartial tribunal for citizens of different states. *Pease v. Peck*, 59 U.S. (18 How.) 595, 15 L.Ed. 518 (1855); *Burt v. Isthmus Dev. Corp.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922, 75 S.Ct. 661, 99 L.Ed. 1254 (1955). Section 1332 creates jurisdiction in a federal court where none would otherwise exist, i.e. no subject matter jurisdiction. The purpose behind § 1500, on the other hand, is to save the Government from having to defend the same suit in two different courts at the same time. Section 1500 takes away jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court. Operationally these two statutes focus on different points in time. The former says, "ordinarily your subject matter cannot be here, but if you satisfy the requirements of this statute, then you may *go ahead and proceed* in federal court." The latter says, "though your subject matter may appropriately be here in the Claims Court, if you come within the proscriptions of this statute, then you *may no longer proceed* here."

Second, the Government's theory fails because it too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind § 1500. The facts of the present case offer a good example. UNR had third-party complaints against the Government pending in federal district court. Unsure of whether the district court had jurisdiction, and facing a running of the statute of limitations, UNR filed the same claim in the Claims Court. More than two years before the Claims Court entertained and acted on the Government's § 1500 motion to dismiss, the district court dismissed UNR's third-party complaints

for lack of jurisdiction.[21] By the time the Claims Court entertained and acted on the Government's § 1500 motion, UNR had no earlier-filed suits pending and had yet to have its day in court. We believe the statute does not operate to preclude UNR from having its day.

Our earlier cases dealing with § 1500, particularly those decided since 1948 when the statute was amended to remove the "filing" language, do not explicitly address the "when filed" question. In those cases in which the question is implicitly involved, the results are generally consistent with this approach. For example, in *British American Tobacco Co. v. United States*, 89 Ct.Cl. 438 (1939),[22] the plaintiff had filed the same claim in a district court and later the same day in the Court of Claims. At the time the Court of Claims entertained the Government's motion to dismiss, the district court action was no longer pending – it had been decided. The Court of Claims dismissed the action because the district court action constituted a final adjudication on the merits. This is in full accord with our ruling today. A plaintiff is not entitled to two bites at the apple. As the *British American Tobacco* case illustrates, when a district court case is no longer pending because it received final adjudication on the merits, the plaintiff is not then entitled to proceed in the Claims Court – the doctrine of res judicata accomplished exactly what § 1500 was originally devised to protect against.

In *Wessel, Duval & Co., Inc. v. United States*, 124 F.Supp. 636, 129 Ct.Cl. 464 (1954), at the time the Court of Claims entertained and acted on the Government's motion to dismiss, the same claim was pending in a district court, and so the Court of Claims dismissed the Action before it. The holdings in *Boston*

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[21] *See supra* note 7 and accompanying text.

[22] In 1982 Congress created the Federal Circuit which succeeded the Appellate Division of the Court of Claims. The Federal Circuit thus views the decisions of that court as binding precedents. At the same time, Congress created the Claims Court to succeed the Trial Division of the Court of Claims, and § 1500 was amended to continue coverage in the newly formed Claims Court.

Five Cents Sav. Bank, FSB v. United States, 864 F.2d 137 (Fed.Cir.1988), *City of Santa Clara v. United States*, 215 Ct.Cl. 890 (1977), and *Casman v. United States*, 135 Ct.Cl. 647 (1956), are inapposite because the pending district court claims in those cases involved a type of relief, i.e. declaratory judgment, that was not available in the Claims Court.

In *Brown v. United States*, 358 F.2d 1002, 175 Ct.Cl. 343 (1966), the Court of Claims considered whether § 1500 barred its jurisdiction when a claim in an earlier-filed district court suit was dismissed for lack of subject matter jurisdiction. The Court of Claims had originally dismissed the claim because at the time it first entertained and acted on the Government's motion to dismiss, the claim was still pending in the district court. *Id.* 358 F.2d at 1004. However, the district court later dismissed the claim for lack of subject matter jurisdiction and the plaintiff moved for a rehearing in the Court of Claims. Under these circumstances, the Court of Claims denied the Government's § 1500 motion to dismiss, stating:

> Our earlier order of dismissal was predicated on the fact that the other "claim remains pending in the said District Court." That is no longer true, and the claim is no longer "pending in any other court." In this situation, we do not believe that 28 U.S.C. § 1500 requires us to deprive the plaintiffs of the only forum they have in which to test their demand for just compensation. • • • • Section 1500 was designed to require an election between two forums both of which could presumably grant the same type of relief. [Citations Omitted]. But Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in this court (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction. Once the claim has been rejected by the other court for lack of jurisdiction, there is no basis in the policy or wording of the statute for dismissal of the claim pending here.

Id. 358 F.2d at 1004-05.

Under the facts of the present case, the reasoning in *Brown* applies with even greater force. In *Brown*, the Court of Claims held that § 1500 did not bar jurisdiction even though the earlier-filed suit was dismissed after the Court of Claims suit was filed, and even though the Court of Claims had already once dismissed the suit because the district court action was still pending. In the present case, all of the earlier-filed suits were dismissed before the Claims Court entertained and acted on for the first time the Government's § 1500 motion to dismiss.

In *Connecticut Dept. of Children & Youth Serv. v. United States*, 16 Cl.Ct. 102 (1989), the Claims Court was confronted with a situation similar to that in *Brown*. In this case, the plaintiff originally filed suit in the district court, but then filed the same complaint in the Claims Court because it realized that the district court might not have jurisdiction and feared that the statute of limitations might run before the district court considered the matter. Unlike *Brown*, however, the district court suit had not been dismissed by the time the Claims Court entertained and acted on the § 1500 motion to dismiss. Given its predicament, the plaintiff asked the court to stay its action until the subject matter jurisdiction of the district court was resolved. The Claims Court correctly noted that under our holding in *Johns-Manville, supra*, the grant of a stay would not escape the bar of § 1500. It went on to note, however, that "[s]hould the federal district court lose its hold on the pending matter, finding it has no jurisdiction over the refund claim, section 1500 would no longer apply and this court would then be freed from the jurisdictional bonds that preclude action at this time." 16 Cl.Ct. at 105.

The Government argues that the *Connecticut Dept. of Children* holding is limited to circumstances in which the statute of limitations has not otherwise run. This, it deems, is the import of the Claims Court's language immediately following the above quote: "Then, and should the limitations period not have passed, this court should properly take and adjudicate the relevant issues. *Brown*, 175 Ct.Cl. at 348, 349, 358 F.2d at 1004, 1005." This, however, was not a condition of the *Brown* holding

In *Brown* the Court of Claims stated: "The plaintiffs could undoubtedly file a new petition, without any bar through Section 1500; it does not seem fair or make sense to insist that this must be done – *with the limitations difficulties it may well entail.*" 358 F.2d at 1005 (emphasis added). In fact, the court in *Brown* suggested that it is when the statute of limitations *does* run that § 1500 should not bar jurisdiction when the earlier-filed suit is dismissed and the Claims Court action was filed before the running of the limitations statute. Section 1500 does not impose a statute of limitation. So the Court of Claim's first statement, i.e. "plaintiffs could undoubtedly file a new petition, without any bar through Section 1500," merely acknowledges that the same claim would not be pending in two different courts at the same time.

V.

[6] We hold then that when an earlier-filed district court case is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction even though the dismissal may have occurred after the filing of the Claims Court action. Under today's decision the § 1500 bar can only be invoked if the Government can show that the earlier-filed suit is still pending at the time the Claims Court entertains and acts on the jurisdictional question.

The Government warns that any interpretation of § 1500 that varies its focus from the time of filing will unduly burden the United States by forcing it to defend an earlier-filed district court complaint and a Claims Court complaint on the same basic claim at the same time, and would in effect give a plaintiff "two bites at the apple." The Government further warns that such interpretaton will require the Claims Court to undertake a burdensome analysis to determine whether the earlier-filed suit is pending. The decision, however, does not fuel these worries.

A claimant is entitled to its day in court. That does not mean, however, that a claimant is entitled to tie up Government resources by forcing it to simultaneously defend itself in two

courts. And this is what § 1500 protects against. If an earlier-filed action is finally dismissed before the Claims Court entertains and acts on the jurisdictional question, then the Claims Court action will be the only suit pending and the plaintiff will have but one day in court.[23] If at the time the Claims Court entertains and acts on the jurisdictional quection the earlier-filed action is still pending, i.e. not finally dismissed, then § 1500 will bar jurisdiction. Plaintiff will then either have to proceed with the earlier-filed action or come back to the Claims Court, if a statute of repose does not prevent, should its district court action be dismissed. The determination that the Claims Court must make is straightforward. Under this rule it is not possible for a plaintiff to prosecute an action both in the Claims Court and in another court at the same time. This is what § 1500 precludes.

VI.

The dissent suggests three simple rules to be derived from § 1500 in lieu of the rule here announced. Rule 1 would key the application of § 1500 to the date of filing of the suit in the Claims Court, so that the same case previously filed and still pending in another court on the date the Claims Court suit is filed would automatically bar the Claims Court case, regardless of whether the previously-filed case is ultimately dismissed in a manner that denies the plaintiff its day in court, or whether the Government is called upon to invest any significant resources in defending the Claims Court action. That is not an unreasonable reading of the statute, but for the reasons stated we find that, given the inherent ambiguity of the statute, both sound policy and legislative history support a different reading.

Rule 2 would apply the same result to the reverse sequence of filing. That is, if the suit is first filed in the Claims Court, and then later in another court, the second filing divests *pro*

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[23] This opinion is limited to earlier-filed suits that are dismissed. Obviously, if an earlier-filed suit is carried through to final adjudication on the merits and is thus no longer pending at the time the Claims Court considers § 1500 jurisdiction, the action would be subject to res judicata principles.

tanto the Claims Court of jurisdiction. Rule 2 requires overruling *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965), which holds that § 1500 on its terms only applies to Rule 1 cases, and not to the reverse sequence cases.

It may well be that *Tecon* does result in an anomalous situation, one not to be lightly attirbuted to a rational legislature. *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"). However, if, as the dissent argues, the time of filing is the critical jurisdictional determinant, Rule 2 cannot logically follow. For in a reverse sequence case, at the time the Claims Court takes jurisdiction there are no other cases pending.

The dissent tries to avoid this logic trap by arguing that jurisdiction is a continuing concept, and that if at some later time requisite events occur, such as the filing of a suit in another court, the Claims Court will be divested of jurisdiction. This adopts at least in part our theory: it is not simply a question of whether at the time of filing there is a pending case, but whether there are two cases being litigated that invokes the bar of § 1500. In short, we reach the same result as the dissent under Rule 2, but we arrive there by applying a consistent rule.

Rule 3 simply restates the principle of res judicata as it applies to these cases; there is no disagreement here.

VII.

UNR filed its Claims Court action on January 16, 1984. Its earlier filed district court cases, i.e. Model Third-Party Complaints A & B, were all dismissed either as of March 12, 1987, or October 20, 1988 when UNR voluntarily dismissed all of its third-party actions that had been stayed through bankruptcy proceedings.

E-P filed its Claims Court action on March 25, 1983. One of its earlier-filed district court cases, *Lopez*, was dismissed on May 19, 1986. Its other earlier-filed district court cases, i.e. Model Third-Party Complaints A & B, as well as some other cases, were dismissed no later than March 12, 1987.

Keene filed its first Claims Court action on December 21, 1979 and its second Claims Court action on September 25, 1981. The earlier-filed district court case that preceded both *Keene I* and *Keene II*, i.e. *Miller*, was dismissed in 1980. Keene's other earlier-filed district court case, *Keene (SDNY)*, which only preceded *Keene II*, was dismissed on September 30, 1981.

The Claims Court entertained and acted on the Government's § 1500 motion to dismiss UNR, E-P and Keene on June 1, 1989. Since none of those parties had the same claims pending in another court on June 1, 1989, we hold that § 1500 does not bar Claims Court jurisdiction.

Keene argues that one of its earlier-filed actions, i.e. *Miller*, does not involve the same "claim" as its Claims Court action *(Keene I)* and that § 1500 therefore does not bar Claims Court jurisdiction. We here decide that *Miller* was not pending so as to bar Claims Court jurisdiction because that case was dismissed before the Claims Court entertained and acted on the Government's § 1500 motion to dismiss. Thus, we need not reach the question of whether *Miller* involved the same claim as *Keene I*.

CONCLUSION

Accordingly, we hold that 28 U.S.C. § 1500 does not bar jurisdiction of the Claims Court when the earlier-filed claim has been finally dismissed after the Claims Court action is filed but before the Claims Court entertains and acts on the Government's § 1500 motion. The Order of the Claims Court dismissing these cases for lack of jurisdiction is therefore reversed and the case is remanded for further action consistent herewith.

REVERSED and REMANDED.

MAYER, Circuit Judge, dissenting.

In my view, the rule announced by the court, that the jurisdictional bar of 28 U.S.C. § 1500 (1988) applies only if the earlier-filed district court case is still pending at the time the Claims Court considers the jurisdictional question, is contrary to the unambiguous language of the statute, its purpose and history. The jurisdiction of the Claims Court should not depend on when a motion to dismiss under section 1500 is filed or is considered by the court, but on whether the same claim is before another court when the Claims Court suit is filed. By today's new rule jurisdiction turns on things like the state of the trial court's docket and the diligence of the assigned judge, factors completely unrelated to the purpose of section 1500 or any other jurisdictional statute, and which are bound to lead to erratic and unpredictable rulings. I respectfully dissent.

By the plain language of section 1500, if the same claim is pending in another court when the plaintiff files his complaint in the Claims Court, there is no jurisdiction, even if the conflicting claim is no longer pending when a motion to dismiss is brought or considered by the court. *See British Am. Tobacco Co. v. United States*, 89 Ct.Cl. 438, 441 (1939) ("there is no merit in the contention ... that this court has jurisdiction ... for the reason that the suit in the District Court has been dismissed and is not now pending").[1] In the context of section 1500, "has pending" means pending at the time the complaint is filed in the Claims Court; it is fundamental that the facts establishing

[1] *British Am. Tobacco* was decided under section 154 of the Judicial Code of 1911 (Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138), later codified at 28 U.S.C. § 260 (1940), the immediate predecessor to section 1500:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

jurisdiction must exist when a suit is filed and defects in jurisdiction cannot be cured by post-filing occurrences.

This construction of section 1500 is consistent with its purpose and legislative history. The original intent was to force an election between a suit in the Court of Claims and one in district court on the same claim. To permit a plaintiff to file and maintain suits in both courts until the government moves to dismiss the Claims Court suit is repugnant to that intent. The government also would end up defending two suits at the same time, contrary to the currently recognized purpose of section 1500.

The language of the original statute,[2] "no person shall file or prosecute any claim ... for or in respect to which he ... shall have commenced and has pending any suit or process in any other court," supports this interpretation of the current provision. From that original language, it is readily apparent that any suit *filed* in the Court of Claims when the same claim was pending in another court fell within the statutory bar and had to be dismissed, no matter when the jurisdictional objection was raised and regardless of intervening actions in the conflicting case. When Congress changed the statute to read "the Court of Claims shall not have jurisdiction ...," the meaning was not changed because jurisdiction must be determined as of the time the complaint is filed.

This is not the first time section 1500 has been given an elastic construction because of its perceived harshness or a sense that

[2] Section 8 of the Act of June 25, 1868, 15 Stat. 77:

> *And be it further enacted*, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States....

it is anachronistic. *See, e.g., Brown v. United States*, 358 F.2d 1002 (Ct.Cl.1966); *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965). But it is still on the books, and it engenders no end of litigation. If it were up to me, these simple rules would govern the use of section 1500: 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata apply. Except for the apparent judicial antipathy for section 1500, these rules would seem to follow logically from its straightforward language. The Supreme Court thought so when it said in *Corona Coal Co. v. United States*, 263 U.S. 537, 540, 44 S.Ct. 156, 156, 68 L.Ed. 431 (1924), "the words of the statute[3] are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

The first rule would govern this case. Arguably, as the court suggests, *ante* at 665, it is inconsistent with *Brown*, 358 F.2d 1002,[4] where the Court of Claims vacated its section 1500 dismissal because the claim that was pending in district court at the time the complaint was filed had been dismissed on jurisdictional grounds by the time the plaintiffs asked for reconsideration of the Court of Claims dismissal. The court did not require the plaintiffs to refile their complaint, apparently because the statute of limitations had run. The reasoning in

[3] The Court was referring to section 154 of the Judicial Code of 1911, see n. 1 *supra*.

[4] And arguably *Brown* is inconsistent with *British Am. Tobacco*, 89 Ct.Cl. 438.

Brown that "Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in [the Court of Claims] (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction," *id.* at 1005, has nothing to do with the plain meaning and purpose of the statute. As in this case, it may have seemed unfair "to deprive plaintiffs of the only forum they [had] in which to test their demand," *id.* at 1004, but there is no room for these considerations in the face of the clear mandate of section 1500. If *Brown* is an impediment, it should be overruled.

The second rule, that the Claims Court be divested of jurisdiction if, after the complaint is filed, the plaintiff files suit on the same claim in another court, is also required by the plain language of section 1500. Jurisdiction must exist at all times during a lawsuit and may be defeated by post-filing occurrences. That is how early cases in both the Supreme Court and the Court of Claims construed the statute. *Corona Coal*, 263 U.S. 537, 44 S.Ct. at 156, dismissed an appeal from the Court of Claims under the predecessor section 154 of the Judicial Code of 1911 because the plaintiff had filed suit in district court on the same claim after the appealed judgment had issued. *Matson Navigation Co. v. United States*, 72 Ct.Cl. 210, 213 (1931), *aff'd on other grounds*, 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932), relied on this aspect of *Corona Coal*:

> The act not only prohibits the filing but also the *prosecution* of any claim in the Court of Claims when another suit on the same cause of action is pending in another court. The seven suits in the District Court of California were filed one day after the suit was filed in this court, but the plaintiff is now attempting to prosecute the suit in this court while the suits in the district court are pending. This is prohibited under the statute.

Hobbs v. United States, 168 Ct.Cl. 646 (1964), is to the same effect.

Congress intended not to dictate the order in which a claimant files suits in the Claims Court and another court on the

same claim, but to discourage him from doing so altogether. Otherwise the purpose of saving the government from defending the same claim in two courts at the same time would be defeated. Therefore, *Tecon Engineers*, 343 F.2d 943, which held that section 1500 applies only when suit is filed in another court on the same claim *before* the complaint is filed in the Court of Claims, should be overruled. That case relied on the deletion of the words "or shall commence and have pending" from the original bill proposed as section 8 of the Act of June 25, 1868.[5] *Id.* at 947. But this deletion did not change the plain meaning of the statute. As recognized in *Matson Navigation Co.*, the words "no person shall file *or prosecute*" mean that a claimant cannot continue to prosecute his Court of Claims suit if he later files the same claim in another court. 72 Ct.Cl. at 213. Thus, the deleted language was superfluous. The meaning of the original statute, as well as of the present section 1500, is that the Claims Court loses jurisdiction when the same claim is filed in another court.

Finally, if the same claim has been before another court but is no longer, ordinary rules of res judicata apply if suit is then filed in the Claims Court. There is no call to invoke section 1500 at all in that event, although other jurisdictional impediments like the statute of limitations might yet remain.

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[5] The original bill, 81 Cong.Globe, 40th Cong., 2d Sess., 2769, provided:

> Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending, *or shall commence and have pending*, any suit or process in any other court against any officer or person who, at the time of the cause as above alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States....

APPENDIX F

E-1

KEENE CORPORATION, Plaintiff,

v.

The UNITED STATES, Defendant.

EAGLE-PICHER INDUSTRIES, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

GAF CORPORATION, Plaintiff,

v.

The UNITED STATES, Defendant.

UNR INDUSTRIES, INC., et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

FIBREBOARD CORPORATION, Plaintiff,

v.

The UNITED STATES, Defendant.

H.K. PORTER COMPANY, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

RAYMARK INDUSTRIES, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

Nos. 579-79C, 585-81C, 170-83C, 287-83C, 16-84C, 514-84C, 515-85C and 12-88C.

United States Claims Court.

June 1, 1989.
As Amended by Order of
Reconsideration June 28, 1989.

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Scott D. Austin, John Beling, William E. Michaels, Henry T. Miller, and David S. Fishback, Sr. Trial Counsel, Washington, D.C., with whom were John R. Bolton, Asst. Atty. Gen. for defendant. J. Patrick Glynn, Director, Torts Branch, and Harold J. Engel, Deputy Director, of counsel.

OPINION

NETTESHEIM, Judge.

These cases are before the court on defendant's motion for summary judgment based on lack of jurisdiction under the restriction imposed by 28 U.S.C. § 1500 (1982).

BACKGROUND

On April 6, 1987, the Claims Court entered an order provisionally dismissing three cases brought by Johns-Manville Corporation and Johns-Manville Sales Corporation (Nos. 465-83C, 688-83C, & 1-84C). *Keene v. United States*, 12 Cl.Ct. 197 (1987). These three cases sought indemnification for plaintiff's liabilities to shipyard workers for injuries caused by exposure to asbestos. Because the same claims were pending in other courts at the same time plaintiffs commenced their actions in the Claims Court, jurisdiction was foreclosed by 28 U.S.C. § 1500. The statute provides:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

The order was certified for interlocutory review.[1] On appeal plaintiffs-appellants argued before the Federal Circuit that since their third-party suits against the Government in district courts are based on tort theories and the direct action suits in Claims Court are founded on express and implied contract, they are different claims and thus not subject to the bar of section 1500. Further, they contended that where, as here, subject matter jurisdiction is not concurrent, forcing a plaintiff to elect between proceeding in district courts or the Claims Court, a strict

[1] The order was reviewed *sub nom. Johns-Manville Corp. v. United States*,

application of section 1500 may preclude any judicial hearing of some theories of recovery. Since district courts have exclusive jurisdiction of tort actions against the United States and the Claims Court has exclusive jurisdiction of contract claims above $10,000, appellants also argued that proceeding in only one forum at a time to avoid offending section 1500 may mean that the statute of limitations eliminates the possibility of pursuing an alternative remedy.

Basing its analysis on both the legislative history of section 1500 and on case law disclosed by the predecessor United States Court of Claims interpreting the term "claim" as used in the statute, the Federal Circuit reasoned that a claim is defined by the facts supporting a suit. Thus, claims grounded on different legal theories of recovery, but founded on the same underlying facts, regardless of what legal theory of recovery those facts are used to support, were held to be the same claim. Since appellants' claims in district court and in the Claims Court were based on the same operative facts, they constitute the same claim, and, thus, the Claims Court correctly held that section 1500 denied it jurisdiction of these cases. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1563-64 (Fed.Cir.1988) (per curiam), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), *aff'g. Keene Corp. v. United States*, 12 Cl.Ct. 197.

The appellete court concluded that section 1500 "was enacted for the benefit of the government and was intended to force an election where both forums could grant the same relief, arising from the same operative facts." 855 F.2d at 1564. Since a plaintiff has no right to pursue a claim in multiple courts simultaneously, Congress' action in forcing an election was aimed at preventing precisely that which would result if appellants' position was adopted – the necessity for the Government to defend the same claim both in the Claims Court and in district courts.

The dismissed cases were but three of eleven cases filed in the Claims Court by asbestos product manufacturers seeking indemnification and/or contribution from the United States for damages incurred in litigating or settling claims from injured

shipyard workers. Following affirmance of the trial court's order, defendant, on November 16, 1988, moved for summary judgment in the remaining eight cases.[2] This motion asserted that, following the rationale of the Federal Circuit, at the time of filing in the Claims Court (or its predecessor), plaintiffs in all eight cases had "pending in . . . [another] court" a suit(s) against the United States. Proceedings on defendant's motion were stayed while appellants in *Johns-Manville Corp.* asked the Supreme Court to consider the order, and briefing resumed and argument on defendant's motion was held after the Supreme Court declined further review.

In order to rule on defendant's motion, this court must first examine the suits identified by defendant to determine (1) if they make the same claims as those made by plaintiffs in the Claims Court, *i.e.*, are predicated on the same operative facts, irrespective of the legal theory pleaded; and (2) as to each plaintiff in the Claims Court, whether its prior-filed suit was pending at the time its Claims Court suit was filed.

FACTS

Plaintiffs are Keene Corporation ("Keene"); Eagle-Picher Industries, Inc. ("Eagle-Picher"); GAF Corporation ("GAF"); UNR Industries, Inc., and UNARCO Industries, Inc. (collectively referred to as "UNR"); Fibreboard Corporation ("Fibreboard"); H.K. Porter Company, Inc. ("H.K. Porter"); and Raymark Industries, Inc. ("Raymark"). Keene has pending two actions in the Claims Court; the remaining plaintiffs, one each. The factual section of this opinion examines the allegations of the actions filed in district court, some of which involve multiple Claims Court plaintiffs; discusses the present status of these actions; and examines the allegations of each plaintiff's Claims Court action.

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[2] On February 27, 1987, defendant moved in respect of five of the plaintiffs, as well as the Johns-Manville plaintiffs. Further briefing and decision were deferred pending the decision in *Johns-Manville Corp.* *See Keene Corp.*, 12 Cl.Ct. at 198-99 n.1.

1. *In re All Maine Asbestos Litigation*, Master Asbestos Docket (D.Me., filed July 21, 1982)

In the omnibus *In re All Maine Asbestos Litigation*, a consolidation of 225 suits brought by present or former shipyard workers or their representatives claiming injury from exposure to asbestos at two Maine shipyards, defendant manufacturers and suppliers commenced third-party actions for contribution or indemnification against the United States. These third-party suits were initiated by Model Third-Party Complaint Against the United States of America "A" ("Model Third-Party Complaint A"), in which the underlying plaintiffs claimed exposure at Bath Iron Works, a private shipyard, and by Model Third-Party Complaint Against the United States of America "B" ("Model Third-Party Complaint "B"), in which the underlying plaintiffs claimed exposure at Portsmouth Naval Shipyard.[1] In both of these complaints, filed on July 21, 1982, Eagle-Picher, UNR, Fibreboard, H.K. Porter, and Raymark were third-party plaintiffs.

1. Model Third-Party Complaint A

Five of the complaint's nine claims are based on negligence and are differentiated by the source and substance of the duty owed and allegedly breached.

Claim 1: Duty to warn of risk of exposure based on the Government's role as seller of asbestos.

Claim 5: Duty to exercise care for workers' safety and to warn them of potential risk based on the Government's role as promulgator of specifications requiring use of asbestos and as the party in control of shipyards.

Claim 6: Duty to exercise care for workers' safety and to warn them of potential risk based on third-party defendant's controlling role in the shipyards, both as owner of vessels and as promulgator of specifications requiring the use of asbestos.

[1] Unlike the claims made in the *Johns-Manville Corp.* suits, the *In re All Maine Asbestos* claims did not specify a time period during which plaintiffs were exposed to asbestos and asbestos products.

Claim 7: Duty to warn and to establish adequate safety regulations and to enforce the safety regulations established based on the Government's controlling role in undertaking study and control of risks of asbestos exposure.

Claim 8: Duty to warn of harm from interaction of tobacco and asbestos exposure based on third-party defendant's superior knowledge of danger of that interaction.

Claim 2, in strict liability, is stated contingently: The manufacturers deny plaintiffs' allegation that the asbestos and asbestos products that they sold were defective or unreasonably dangerous. However, the third-party plaintiff's claim that if the asbestos and asbestos products that they sold are found to have been defective or unreasonably dangerous, then the asbestos and asbestos products sold by third-party defendant to them were defective and unreasonably dangerous.

Model Third-Party Complaint A contains two claims based on implied warranty. Claim 3 alleges breach of warranty of safety and fitness for intended purpose based on third-party defendant's role as seller of asbestos. Claim 4 alleges breach of an implied warranty to exercise due care in specifying asbestos products and in regulating their use to ensure a safe workplace.

Finally, the complaint contains a claim stating that if admiralty jurisdiction applies, third-party plaintiffs are entitled to contribution and indemnification under admiralty and maritime law.

2. Model Third-Party Complaint B

This complaint essentially mirrors Model-Third Party Complaint A, with the following minor exceptions. Negligence claims 6 and 8 plead breach of duty to warn of dangers of asbestos exposures subsequent to shipyard employment. Claim 2 alleges strict liability only for raw asbestos sold by third-party defendants, not asbestos products.

3. Current Status

The third-party actions in *In re All Maine Asbestos Litigation* have been dismissed by the federal district court in Maine.

All claims of Model Third-Party Complaint A but one were dismissed by order of February 23, 1984. *In re All Maine Asbestos Litigation*, 581 F.Supp. 963 (D.Me.1984). Dismissal of Claim VI against the Government as vessel owner was denied. Following reconsideration of its position on the vessel owner claim, the court on March 12, 1987, entered an order dismissing the remaining Model Third-Party Complaint A claim. *In re All Maine Asbestos Litigation (BIW Cases)*, 655 S.Fupp. 1169 (D.Me.1987). The orders of dismissal were affirmed on July 20, 1988. *In re All Maine Asbestos Litigation (BIW Cases)*, 854 F.2d 1328 (Fed.Cir.1988) (Table), *aff'g mem.*, 651 F.Supp. 913 (D.Me.1986), 655 F.Supp. 1169 (D.Me.1987).

The contract and tort claims of Model Third-Party Complaint B also were dismissed in 1984, but decision on the vessel owner claim was reserved. *In re All Maine Asbestos Litigation*, 581 F.Supp. at 981. Dismissal of that claim was later denied. *In re All Maine Asbestos Litigation (PNS Cases)*, 589 F.Supp. 1571 (D.Me.1984). On interlocutory review of the ruling on the admiralty claim, the First Circuit reversed, and subsequently a petition for writ of *certiorari* was denied. *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir.1985), *cert. denied*, 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986). Finally, the district court entered an order dismissing with prejudice all claims against the United States in Model Third-Party Complaint B. *In re All Maine Asbestos Litigation (PNS Cases)* Master Asebstos Docket (D.Me. July 16, 1986).

II. Claims Court cases involving Third-Party plaintiffs in *In re All Maine Asbestos Litigation*

1. *Eagle-Picher Industries, Inc.*, No. 170-83C (Cl.Ct., filed Mar. 25, 1983)

On March 25, 1983, Eagle-Picher filed suit in the Claims Court based on contractual theories allegedly entitling it to recover costs associated with litigating and settling claims against plaintiff for asbestos-caused injuries.

According to Eagle-Picher, the Government's promulgation and enforcement of specifications for asbestos products created

a warranty of accuracy, feasibility, and safety of complying products. By both writing specifications and controlling the workplace where asbestos products were used, the Government impliedly warranted that it would use sufficient care in specifying and using such products that the workplace would be safe. Eagle-Picher also alleged that the Government had an implied contractual duty to reveal to plaintiff its superior knowledge of the dangers of asbestos growing out of that superior knowledge and its role as issuer of specifications.

2. *UNR Industries, Inc.*, No. 16-84C (Cl.Ct., filed Jan. 16, 1984)

On January 16, 1984, UNR filed an action in the Claims Court seeking money damages for breach of express and implied contracts. The complaint alleges breach of five warranties or contractual duties: a warranty of safety arising from the Government's participation in development of UNR's asbestos products based on the Government's promulgation and enforcement of product specifications; a warranty that those specifications were accurate, feasible, and safe based on the Government's role as supplier of asbestos and from its requirement that asbestos be used in UNR's insulation products; a warranty that such products would be free of defects based on the Government's role in controlling the development of insulation products and in controlling the use of the products in the shipyards; and a warranty that those products would be used safely based on the Government's superior knowledge of the danger posed by asbestos products and a contractual duty to reveal that knowledge to UNR.

3. *Fibreboard Corp.*, No. 514-84C (Cl.Ct., filed Oct. 4, 1984)

Filed in the Claims Court on October 4, 1984, Fibreboard's complaint grounds entitlement to indemnification for expenses incurred in settling claims against Fibreboard brought by shipyard workers exposed to asbestos products supplied by Fibreboard "[d]uring World War II, and at other times." Compl. ¶ 1, on the Government's breach of express and implied

contracts, on violation of a statute and the fifth amendment of the United States Constitution, and on considerations of equity.

Fibreboard makes six contract claims: 1) By writing specifications for asbestos products and requiring compliance with them, the Government warranted that the specifications were adequate and that compliance would produce a satisfactory product; 2) by requiring compliance with wartime orders and regulations, the Government impliedly agreed to hold Fibreboard harmless from any resulting liability; 3) as a supplier of raw asbestos, the Government warranted its suitability, fitness, and safety for its intended purpose; 4) by its control over specifications and over the use of the asbestos products, the Government covenanted that such use would be in a safe and proper manner, so that Fibreboard would not be deprived of the benefit of its contracts; 5) by retaining title to the asbestos used by Fibreboard, a contract of bailment was created under which the Government assumed all risks incident to its use; 6) by limiting the amount of liability insurance Fibreboard could include as a cost in its contracts, the Government agreed to assume any uninsured risks.

Fibreboard claims entitlement to recovery of costs that it incurred consequent to the Government's violation of the Selective Training and Service Act of 1940, Pub.L. No. 76-783, § 9, 54 Stat. 885 (1940), since the Government's alleged failure to take precautions to avoid injury deprived Fibreboard of the right under the Act to fair and just compensation for the performance of war contracts. Fibreboard also claims that the Government's limitation of its own liability and failure to enforce safety standards while aware of potential risks shifted liability for those risks to Fibreboard and that the costs plaintiff incurred thereby constituted a taking of Fibreboard's property without just compensation in violation of the fifth amendment. Finally, Fibreboard charges that the Government's concealment of its knowledge of the risk posed by asbestos use and of the inadequacy of precautions taken constituted bad faith in negotiating and performing the contracts, thus forming the basis for reformation of those contracts.

4. *H.K. Porter Company, Inc.*, No. 515-85C (Cl.Ct., filed Sept. 6, 1985)

The suit by H.K. Porter, filed in the Claims Court on September 6, 1985, seeks indemnification for its damages from suits for injuries from asbestos exposure "[d]uring World War II, and at all times relevant hereto." Compl. ¶ 5. The suit encompasses four contract claims and a fifth amendment claim.

H.K. Porter's first contract claim is essentially identical to Eagle-Picher's claim based on warranty of specifications, with the further warranty that contract performance in compliance with the specifications would not increase H.K. Porter's costs. The second contract claim mirrors Eagle Picher's claim based on warranty of care in use, with the addition of an implied covenant of good faith and fair dealing that obligated the Government to specify and use H.K. Porter's products safely. H.K. Porter's fourth contract claim is the same as Eagle-Picher's superior knowledge claim. The sale by the Government of raw asbestos to H.K. Porter without including warnings allegedly created an implied warranty that the asbestos was safe, merchantable, and fit for its intended purpose. H.K. Porter's fifth amendment claim embodies the same rationale as that of Fibreboard's.

5. *Raymark Industries, Inc.*, No. 12-88C (Cl.Ct., filed Jan. 7, 1988)

Raymark, the most recent claimant against the United States seeking indemnification for settlements and litigation of asbestos caused injuries, filed a response to defendant's summary judgment motion on December 15, 1988, stating that it had determined not to oppose defendant's motion based on prudential considerations of Federal Circuit decisions on section 1500 and on the merits and in view of RUSCC 11.

III. Third-party suits in the Western District of Washington, Nos. C-80-923M, C-80-924M, C-84-154M, *et al.* (W.D. Wash., third party filed Feb. 3, 1983)

On February 3, 1983, Eagle-Picher filed ten third-party suits against the United States seeking indemnification for its liabilities to employees with asbestos related injuries allegedly caused while employed at the Puget Sound Naval Shipyard. One of these ten cases, *Albert Lopez, et al. v. Eagle-Picher Industries, Inc. v. United States*, No. C-84-155M (W.D.Wash., filed Feb. 3, 1983), which was treated as a test case, was dismissed on May 19, 1986, for failure to state a claim. *Lopez v. Johns Manville*, 649 F.Supp. 149 (W.D.Wash. 1986). Although the decision in *Lopez* indicated that all third-party claims against the Government were dismissed, orders dismissing the remaining nine cases were not entered until June 30, 1986. The dismissal in *Lopez* was appealed and affirmed *sub nom. Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed.Cir.), *reh'g denied* (Nov. 21, 1988), *petition for cert. filed sub nom. Raymark Industries, Inc. v. United States*, No. 88-1418, 57 U.S.L.W. 8606 (U.S. Feb. 21, 1989). The Western District of Washington decision in *Lopez* also discussed and disposed of a number of third-party actions filed by Raymark on February 7, 1983. The Federal Circuit's affirmance of *Lopez* also affirmed the dismissal of Raymark's appeal.

The Western District of Washington suits wre initiated by a complaint containing nine claims, five in negligence, two in contract, and two in admiralty.

The negligence claims, although containing minor variations in language, are the same as those made in the *All Maine Asbestos Litigation* third-party suits. Claim 3 is for breach of duty to exercise due care in making the workplace safe arising from third-party defendant's role in controlling specifications and the shipyards (*All Maine Asbestos* claim 5). Claim 4 is for breach of duty to warn and make the workplace safe based on third-party defendant's role as owner of vessels and work places (*All Maine Asbestos* claim 6). Claim 5 alleges that third-party

defendant assumed a duty to warn and to establish and enforce safety regulations by undertaking to study danger of asbestos exposure and efforts to protect the health of shipyard workers (*All Maine Asbestos* claim 7). Claim 6 alleges a duty to warn of the health risks of esposure both to tobacco and asbestos based on third-party defendant's superior knowledge of those risks (*All Maine Asbestos* claim 8). Claim 7 is for breach of duty to warn of health risks arising from third-party defendant's role as seller of raw asbestos while knowing of such risks (*All Maine Asbestos* claim 1).

The first contract claim in the Western District of Washington actions, claim 1, alleges that by writing and enforcing specifications for asbestos products, third-party defendant impliedly warranted the specifications for accuracy, feasbility, and safety. Claim 2 alleges breach of implied warranty of care in specifying and using asbestos products based on the Government's role in controlling the specifications and shipyards.

The two admiralty claims are contingent: If admiralty jurisdiction is applicable and if third-party plaintiffs are found liable for injuries sustained by shipyard workers, then third-party plaintiffs are entitled to indemnification or contribution from third-party defendant because the injuries were caused by wrongs of the Government (claim 8), and because the allegedly defective asbestos was sold by third-party defendant to the manufacturers and used by them in compliance with specifications promulgated by third-party defendant (claim 9).

IV. Claims Court cases involving third-party plaintiffs in Western District of Washington cases

Both Eagle-Picher and Raymark are third-party plaintiffs in the Washington cases. Eagle-Picher's Claims Court suit is synopsized *supra* at p. 150; Raymark's position on defendant's motion is discussed *supra* at p. 152.

V. *Mann v. Pittsburgh Corning Corp., et al. v. United States*, No. 83-477-N (E.D.Va., third party filed Jan. 13, 1984, and June 15, 1984)

Both Raymark and H.K. Porter filed third-party actions against the United States for indemnification and contribution in the *Mann* case in January and June 1984, respectively. The underlying suit alleges that Charles Wesley Mann was exposed to Raymark's asbestos products from July 1946 until February 1973, during his employment at Norfolk Naval Shipyard. The two third-party actions are currently pending in the Eastern District of Virginia.

Of the nine claims made in the third-party action, all but one are essentially the same as claims made in *All Maine Asbestos Litigation* and/or in the Western District of Washington cases. Claim 6 alleges entitlement to indemnification because, should it be found that third-party plaintiff was negligent, such negligence was passive and secondary to the active and primary negligence of third-party defendant. Under this theory primary responsibility lies with the Government for any injuries arising from asbestos exposures, because the Government controlled the workplace and specifications for asbestos products.

VI. Claims Court cases involving Third-party plaintiffs in *Mann*

Raymark's position on this motion is discussed *supra* at p. 152. The claims of H.K. Porter in the Claims Court have been addressed *supra* at p. 152.

VII. *Miller v. Johns-Manville Bldg. Prod., et al.*, No. 78-1283E (W.D.Pa., filed June 1, 1979)

This action was brought against nine asbestos suppliers, including Keene Building Products, by the personal representative of the estate of a laborer allegedly injured from asbestos exposure in 1943. A third-party action by Keene against the United States and Celotex Corporation was initiated on June 1, 1979, by the law firm of Keene's insurance company.

The theory of the third-party action is that, if plaintiff was injured by asbestos dust, the asbestos was mined and manufactured by Celotex Corporation and was supplied by, or

according to specifications of, the Government. Therefore, should Keene be found liable for plaintiff's injuries, Keene is due contribution or indemnification from Celotex Corporation and the Government.

Although it is unclear whether the court acted on Keene's motion voluntarily to dismiss its third-party complaint, defendant accepts a dismissal date of May 13, 1980.

VIII. *Keene Corp. v. United States*, No. 579-79C (Ct.Cl., filed Dec. 21, 1979; amended petition filed May 1, 1981)

The first of Keene's suits, filed on December 21, 1979, with the predecessor Court of Claims, contained four warranty claims. Subsequently, on May 1, 1981, Keene filed an amended petition, by leave, also containing four warranty claims varying to some extent from the initial four. Keene's damages grow out of more than 5,000 suits filed against it by persons alleging injury from asbestos exposure "commencing as early as the mid-1930's." Amended Pet. ¶ 13.

In the amended petition, plaintiff claims that the Government, as supplier of asbestos, made and breached a warranty that the asbestos would be safe for its intended purpose. The Government also allegedly breached an implied warranty to use asbestos products safely to avoid injury. This warranty arose both because of the Government's control over the workplace and because of its role as promulgator of specifications and its superior knowledge of hazards. The Government's superior knowledge also allegedly created a duty to reveal that knowledge since it increased third-party plaintiff's cost of performance. The Government allegedly made and breached a warranty that compliance with its specifications would result in a safe product.

IX. *Keene Corp. v. United States*, No. 80-CIV-0401 (GLG) (S.D.N.Y., filed Jan. 22, 1980)

This suit seeking indemnification, contribution, or apportionment for amounts Keene has spent, and may be required to spend, in defending and settling thousands of personal injury

actions was filed on January 22, 1980. The underlying actions also are for injuries from exposures back to the 1930's.

The indemnification suit consisted of 23 counts, eight of which allege breach of implied warranty. Counts 2 and 15 claimed breach of warranty that asbestos supplied by the Government be safe for its intended purpose, and counts 8 and 18 asserted breach of a warranty that if the Government's specifications were complied with, satisfactory performance would result. Count 16 alleged breach of warranty to make the workplace safe, and counts 6, 10, and 17 alleged breach of warranty to use asbestos products in a safe manner.

The nine counts for negligence charged the Government with breach of duty to provide a safe workplace (counts 3 and 5), to warn of risks of exposure to asbestos (counts 4 and 9), and to design a safe product (count 7). Two broad counts included all specified negligence charges (counts 11 and 12).

Count 13 alleged strict liability for the Government's having knowingly sold a defective product.

Keene also made five claims under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1976) (the "FECA"). Plaintiff claimed that since the Government has limited its liability to amounts due under the FECA and recoups amounts paid under FECA from any settlements or judgments paid by plaintiff, the Government thereby is unjustly enriched (count 19); that plaintiff is due such amounts as "money had and received" (count 20); that such recoupment has increased plaintiff's costs (count 21); that the recoupment amounts to a taking of plaintiff's property without compensation (count 22); and that continuation of recoupment by the Government causes plaintiff irreparable injury for which it has no adequate remedy at law (count 23).

This suit was dismissed by the district court for pleadings inadequate to invoke FTCA jurisdiction. *Keene Corp. v. United States*, No. 80-Civ-0401 (S.D.N.Y. Sept. 30, 1981). On appeal the Second Circuit affirmed the order of dismissal. *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.1983), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

X. *Keene Corp. v. United States*, No. 585-81C (Ct.Cl., filed Sept. 25, 1981)

Filed in the Court of Claims on September 25, 1981, Keene's second petition alleges a violation of plaintiff's fifth amendment rights and demands compensation for amounts paid in settlements and judgments in favor of claimants allegedly exposed to Keene's asbestos products beginning in the 1930's. Claim 1 alleges that the recoupment by the Government of amounts that it has paid to injured workers under FECA is an unconstitutional taking of Keene's property without just compensation, because the injuries to underlying plaintiffs were caused by actions of the Government. Further, such recoupments increase the amounts of judgments and settlements required to be paid by Keene. In claim 2 plaintiff charges that the FECA recoupments impair plaintiff's contract rights and thus amount to a fifth amendment taking.

XI. *GAF Corp. v. United States*, No. 83-1322 (D.D.C., filed May 6, 1983)

On May 6, 1983, GAF filed an indemnification action against the United States in the United States District Court for the District of Columbia to recover Keene's damages from 766 shipyard worker suits alleging exposure from the 1930's to the date of the suit. The suit consisted of one implied warranty count, three negligence counts, and a "summary" count alleging entitlement to indemnification.

Claims in negligence are for negligent and wrongful design of specifications for asbestos products (similar to *All Maine Asbestos* claim 5) and breach of duties to provide a safe workplace (*All Maine Asbestos* claim 6) and to reveal superior knowledge of risk of exposure to asbestos.

The warranty count alleges breach of warranty of safety, merchantability, and fitness of asbestos sold by the Government to plaintiff without warnings.

GAF's fifth count does not add breaches of duty or of warranty obligation, but, rather, states that the Government's

controlling role as the promoter of production, promulgator of specifications, seller of asbestos, and operator of shipyards rendered GAF's actions in causing injuries to plaintiffs in underlying suits passive and secondary. Therefore, GAF claims entitlement to indemnification for amounts that it has been required to pay to those underlying plaintiffs.

The case is pending in district court.

XII. *GAF v. United States*, No. 287-83C (Cl.Ct., filed May 5, 1983)

GAF's Claims Court action was filed on May 5, 1983, one day prior to its filing in the United States District Court for the District of Columbia. Although a suit for indemnification, the complaint does not specify dates of exposure alleged in the underlying suits. The complaint contains four claims in contract. Claim 1 is for breach of implied warranty of accuracy, feasibility, and safety of specifications for asbestos products that were promulgated and enforced by the Government. Claim 2 is for breach of the implied warranty of due care in using asbestos products in shipyards that were controlled by the Government. As seller of raw asbestos to GAF, the Government is charged with an implied warranty that it was safe, merchantable, and fit for its intended purpose. GAF also alleges breach of implied duty to reveal the Government's superior knowledge of the risks of exposure to asbestos.

DISCUSSION

[1] 28 U.S.C. § 1500 prevents this court from exercising subject matter jurisdiction if, as of the date an action is filed, plaintiff has pending in another federal court the same claim. The jurisdictional inquiry targets the date of filing in the Claims Court, not some subsequent date, such as the date on which the Government is made aware of the antecedent action, or the date on which the Government invokes section 1500 seeking to dismiss the Claims Court action, or the date on which the Claims Court acts. *Tecon Engr's, Inc. v. United States*, 170 Ct.Cl. 389, 395, 399, 343 F.2d 943, 946, 949 (1965), *cert. denied*, 382 U.S. 976, 85 S.Ct. 545, 15 L.Ed.2d (1966). Therefore, a plaintiff cannot cure a want of jurisdiction in

the Claims Court by voluntarily or involuntarily dismissing its parallel action, or even by suffering a court-ordered termination on the merits. This overarching principle was not acknowledged in the earlier-filed *Keene Corp.* order, in which this court indicated that circumstances might justify allowing a plaintiff to withdraw an earlier-filed action to permit the Claims Court action to proceed. *See Keene Corp.*, 12 Cl.Ct. at 216. However, the Federal Circuit gave no encouragement to allowing a subsequent cure, and the Supreme Court's intervening decision in *Christianson v. Colt Industries Operation Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 2166, 2178, 100 L.Ed.2d 811 (1988), countermands it.

[2] The issues* to be resolved are 1) whether plaintiffs' Claims Court suits plead the same operative facts as do earlier-filed actions against the United States and 2) if so, as to each plaintiff, whether the earlier-filed action was pending when the Claims Court suit was filed. As to GAF, there is the separate issue of whether its later-filed case should be treated as "pending,"

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* Either the Federal Circuit in *Johns-Manville Corp.* or this court in *Keene Corp.*, as approved in *Johns-Manville Corp.*, has already addressed all of plaintiffs' other arguments, including: 1) that differing operative facts as between the instant non-Claims Court and Claims Court actions take these cases outside the coverage of section 1500; 2) that the existence of different underlying claimants as between the non-Claims Court and Claims Court actions takes a case outside the coverage of section 1500; 3) that differing legal theories in the non-Claims Court and Claims Court actions take a case outside the coverge of section 1500; 4) that a stay of a pre-filed non-Claims Court action takes a case outside the coverage of section 1500; 5) that a plaintiff may be given an opportunity to withdraw or secure dismissal of a pending pre-filed non-Claims Court action, and that if it then withdraws or secures dismissal of said action, section 1500 will not require dismissal of the Claims Court action; 6) that the law of the case doctrine requires denial of defendant's section 1500 motion; 7) that section 1500 does not apply when the non-Claims court action is a third-party action; and 8) that a claim in an amended complaint in the Claims Court filed after a district court action has been dismissed in whole or part does not relate back to the date on which the original complaint was filed. The court adopts defendant's analysis, including citations, of the prior treatment of issues Nos. 1-7 in its final brief. *See* Def's Br. filed Apr. 21, 1989, at 4-11. Issue No. 8 was treated in *Keene Corp.*, 12 Cl.Ct. at 210. *See also infra* note 6.

because it was filed only one day after GAF's Claims Court action.

Defendant argues that section 1500 prevents the Claims Court from exercising jurisdiction over all the actions. As to each plaintiff, it is defendant's position that jurisdiction is precluded because an earlier-filed complaint asserting the same claim or claims as pressed in the Court of Claims or Claims Court was pending in federal district court when the action was commenced here. Although plaintiffs briefed the issues individually, they argue in common that the Federal Circuit's decision in *Johns-Manville Corp.* does not reach their Claims Court actions on the basis that no pending action on the same claim or claims now exists.

The Federal Circuit approached the first issue, as had this court, by analyzing the operative facts cited in the earlier-filed and Claims Court actions, respectively, to ascertain whether there is present the requisite homogeneity of operative facts to constitute the same claim. *See* 855 F.2d at 1559.

All complaints in other courts and the Claims Court cases seek recovery for costs and expenses incurred and other damages engendered by suits brought by shipyard workers against plaintiffs alleging injury from exposure to asbestos or asbestos products. The complaints or third-party complaints of each plaintiff filed in district court and each plaintiff's Claims Court action are framed upon a homogeneity of operative facts, including some or all of the following:

- the Government's specifications required asbestos in the insulation products;
- plaintiffs were compelled to perform the supply contracts with the Government;
- the Government controlled the shipyard working conditions;
- the Government restricted access to the shipyards;
- the Government impliedly agreed not to hold plaintiffs liable for damages, provided that the asbestos products were made according to the specifications;

- the Government had a duty to develop and, once adopted, to enforce its standards for limiting exposure to asbestos or asbestos products;
- the Government had a duty to disclose its knowledge of the shipyard working conditions;
- the Government knew of the dangers of exposure to asbestos and asbestos products;
- the Government failed to disclose information regarding shipyard working conditions;
- plaintiffs are not liable for acts of omissions of the Government.

It is concluded, therefore, that all the prior-filed complaints and GAF's complaint constitute suits on the same claims as plaintiffs' claims filed in the Court of Claims and later in the Claims Court.

[3] Plaintiffs, other than GAF, argue vigorously that their earlier-filed actions were not pending for purposes of barring the Claims Court from taking jurisdiction over their complaints, because the earlier actions were stayed or had been dismissed voluntarily or involuntarily when the matter came before the court on defendant's February 27, 1987 motion or now, *i.e.*, the date on which this court acts on defendant's motion. The Federal Circuit's opinion does not support putting a gloss on "pending" actions such as to exclude stayed, suspended, or otherwise inactive cases. *Johns-Manville Corp.*, 855 F.2d at 1567; *see supra* note 4. The Court of Claims in *British American Tobacco Co. v. United States*, 89 Ct.Cl. 438 (1939), *cert. denied*, 310 U.S. 627, 60 S.Ct. 974, 84 L.Ed. 1398 (1940), dismissed an action under the predecessor to section 1500 even though the simultaneously-filed suit had been terminated by that time. Moreover, *Tecon Engineers* fixed the jurisdictional event as the date the action was filed in the Court of Claims or Claims Court. "The words 'shall not have jurisdiction' pertain solely to the acquiring or taking of jurisdiction by this court when the same plaintiff *already* 'has pending in any other court'

another suit on the same claim . . . " 170 Ct.Cl. at 395, 343 F.2d at 946 (emphasis in original.)[8]

The court has recognized at least one situation in which an earlier-filed action will not preclude maintaining an action in the Claims Court. In *National Steel & Shipbuilding Co. v. United States*, 8 Cl.Ct. 274 (1985), as a result of questioning its jurisdiction to proceed, a federal district court required plaintiff to file a subsequent identical action in the Claims Court. This court wrote:

> The Government here concedes that jurisdiction lies over plaintiffs' complaint in the district court, although the contrary was urged to Judge Neilsen. The Government takes the position now that the jurisdiction reposed in the district court and the Claims Court is not concurrent, because only this court can consider claims based on an implied-in-fact contract. It is not decided whether such a contract has been established. However, if this court's exercise of jurisdiction turned on such a determination, plaintiffs would be whipsawed – which Congress manifestly did not intend – by exercising their prerogative to file a lawsuit in district court only to be met with the objection that the claim is really one based on an implied-in-fact contract, which lies exclusively within the jurisdiction of this court, and then met in this court (assuming the district court action had been dismissed) with the argument that jurisdiction was lacking due to the failure to prove a contract implied in fact.

8 Cl.Ct. at 275. This court invoked 28 U.S.C. § 1500 to dismiss the Claims Court action. However, if the district court were to resist jurisdiction, the action was allowed to be reinstated. *Id.* at 276.

This result is not unlike the Federal Circuit's approach in *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed.Cir.), *rev'g*, 14 Cl.Ct. 217 (1988), a decision issued several months following *Johns-Manville Corp.* Prior to filing in the Claims Court, plaintiff had tried to assert a money claim in its pending district court action by amendment, but was unsuccessful. The appeals court concluded that the failed amendment did not constitute a pending claim. It also was held that the Claims Court had jurisdiction of a contract claim for money, over which it had exclusive jurisdiction, even though plaintiff had filed an identical claim on the same day in district court. The Federal Circuit held that the Claims Court should have retained jurisdiction by way of suspension pending resolution of the earlier-filed district court complaint for declaratory relief based on the same operative facts. The Federal Circuit relied on *Hossein v. United States*, 218 Ct.Cl. 727 (1978), in reversing the dismissal of the Claims Court action. In *Hossein* the Court of Claims had ruled that section 1500 was inapplicable to a suit in contract for money damages over which the court had exclusive jurisdiction when an identical contract action had been filed contemporaneously in district court. The premise of *Boston Five Cents Savings Bank*, the most recent decision applying section 1500, was that dismissal of a claim based on the same operative facts is not justified if the Claims Court should know that jurisdiction belongs exclusively in the Claims Court. *Accord Brown v. United States*, 175 Ct.Cl. 343, 358 F.2d 1002 (1966) (because district court lacked jurisdiction over

[8] The principal prior-filed district court action in *Johns-Manville Corp.* had been stayed informally at the time that this court alerted the parties to the problem of section 1500. Therefore, both this court's *Keene Corp.* order and the Federal Circuit's *Johns-Manville Corp.* opinion considered the applicability of section 1500 in the circumstance of an earlier-filed district court suit still pending, albeit stayed. However, the construction of section 1500 that emerges from the Federal Circuit's opinion and this court's order is that section 1500 is applicable as of the date an action is filed in the Claims Court: "The purpose of section 1500 is to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time." *Johns-Manville Corp.*, 855 F.2d at 1562 (citation omitted); *see also Keene Corp.*, 12 Cl.Ct. at 206, 207, 212 n. 9. (In the third citation this court referred to section 1500 as prohibiting "the maintenance of an action in the Claims Court if an action on the same operative facts is pending elsewhere." The word "maintenance" was intended to signify exercise of jurisdiction consistent with the references at pp. 206 and 207.)

plaintiffs' money claim, but had jurisdiction over their equitable claim, Court of Claims reinstated the previously dismissed money claim once district court had dismissed it); *Casman v. United States*, 135 Ct.Cl. 647 (1956) (equitable relief sought in district court did not deprive Court of Claims of jurisdiction over money claim).

[4,5] The approach of this court in *National Steel* and that of the Federal Circuit in *Boston Five Cents Savings Bank* must be tempered with the knowledge that they can defeat the purpose of 28 U.S.C. § 1500 if the litigation to perfect jurisdiction in the federal district court is time-consuming, extensive, and costly. Nonetheless, the Federal Circuit in *Boston Five Cents Savings Bank* adopted a case-by-case analysis to ascertain whether the prior-filed district court action should bar a later Claims Court action, and Keene's petition, No. 579-79C filed in the Court of Claims on December 21, 1979, after it had filed a third-party complaint against the United States in *Miller*, commends this type of analysis.*

Keene's third-party claim against the Government in *Miller* has been extinguished for nine years. It was filed on June 1, 1979. Keene alleges that local counsel was not authorized to file the May 9, 1979 motion to file the third-party complaint. This assertion is unsupported by affidavit as required by RUSCC Appendix H ¶ 1. *See Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 769 (Fed.Cir.1988). Argument of counsel does not

* Keene argues that filing its amended complaint with the Court of Claims in No. 579-79C after the dismissal of the third-party complaint in *Miller* cures any jurisdictional defect. This argument was rejected in *Keene Corp.*, 12 Cl.Ct. at 210. *See supra* note 4. As defendant argues, if the factual predicate for jurisdiction existed at the time an action originally was brought, an amendment is permitted by 28 U.S.C. § 1653 (1982), to cure a deficient pleading. *See Mathews v. Diaz*, 426 U.S. 67, 75 & n. 9, 96 S.Ct. 1883, 1889 & n. 9, 48 L.Ed.2d 478 (1976). However, an amended complaint cannot cure a jurisdictional defect, *i.e.*, to effect the removal of the pendency at the time the Claims Court action is commenced of an earlier-filed, but subsequently dismissed, action on the same operative facts. *See Reynolds v. United States*, 748 F.2d 291, 293 (5th Cir.1984) (amended complaint under the Federal Tort Claims Act dismissed as relating back to original filing date on which no subject matter jurisdiction existed because administrative remedy was not exhausted).

substitute for averments in an affidavit. *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed.Cir.1984). However, Keene's April 23, 1980 motion to dismiss its third-party complaint against the United States in *Miller* pleads that "Keene Building Products Corporation has instituted an action in the Court of Claims against the United States of America which should resolve the differences between the parties." Therefore, Keene has established that the complaint was withdrawn voluntarily.

This court, fully advised by Keene's persuasive arguments, nonetheless concludes that 28 U.S.C. § 1500 deprived the Court of Claims of jurisdiction when its petition was filed, even though Keene voluntarily withdrew the third-party complaint within one year. Were the result otherwise, the precedent would devour the rule. Assuming that a plaintiff could establish that an action within the jurisdiction of another court against the United States was unauthorized (which Keene failed to do in the case at bar), the Claims Court would be required to examine all the litigation activity for one year (or perhaps longer) to ascertain if the Government was engaged sufficiently so that a plaintiff should not be allowed to defer to the Claims Court. The result may seem harsh, but the Supreme Court long ago acknowledged that, given the plain meaning of the statute, a court is "not at liberty to add an exception in order to remove apparent hardship in particular cases." *Corona Coal Co. v. United States*, 263 U.S. 537, 540, 44 S.Ct. 156, 68 L.Ed. 431 (1924) (citations omitted). Application of section 1500 does not call for examining the record of the district court in this manner. Suffice it to say that Keene's situation in respect of *Miller* is not *National Steel* or *Boston Five Cents Savings Bank*.

[6] GAF's complaint was filed one day after its complaint had been accepted for filing by the Claims Court. *Tecon Engineers* ruled that Section 1500 does not apply to such actions. 170 Ct.Cl. 389, 343 F.2d 943. Counsel for GAF ably has demonstrated that langauge in *Tecon Engineeers*, 170 Ct.Cl. at 400-01 & nn. 4, 7, 343 F.2d at 950 & nn. 4, 7, concerning "simultaneously" filed actions does not exclude an action filed

in federal district court one day after an action was commenced in the Court of Claims from coming within *Tecon*'s safe harbor.[7]

This court has concluded that a proper application of the canons of statutory construction in light of the purpose of section 1500 calls for a reexamination of *Tecon Engineers*. *See Keene Corp.*, 12 Cl.Ct. 205-07, 212-16. *Keene Corp.* took the position that section 1500 by its express language applies to actions on the same claim whether filed before or after a plaintiff institutes a Claims Court complaint. Thus the purpose of the statute – to conserve the Government's litigation resources by forcing a plaintiff to forego the Claims Court as a forum if it elects to have the Government defend in other courts – only is served by invoking the bar to jurisdiction irrespective of when a plaintiff initiates its suit in the Claims Court – before or after another suit on the same claim. Similarly, Congress has established that a later-filed claim for refund in the United States Tax Court can deprive a federal district court or the Claims Court of jurisdiction to the extent that it has been acquired. 26 U.S.C. § 7422(e) (1982). Although this court agrees with GAF's argument that *Tecon* created a jurisdictional bright line, *i.e.*, section 1500 does not reach a suit filed one day following commencement of a Claims Court action, the *Tecon* rule does not comport with the purpose of section 1500. Nonetheless, *Tecon Engineers* is binding precedent on this court.[8]

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[7] *Tecon Engineers* discussed, but did not overrule, *Hobbs* v. *United States*, 168 Ct.Cl. 646 (1964) (per curiam). In *Hobbs* plaintiff filed a petition for review of an administrative decision in a federal appeals court one day after commencing his action on the same operative facts in the Court of Claims. The Court of Claims construed section 1500 as "clearly depriv[ing] this court of jurisdiction." 168 Ct.Cl. at 647. As this court noted in *Keene Corp.*, 12 Cl.Ct. at 207, the Court of Claims in *Tecon Engineers* suggested that suits filed simultaneously with Court of Claims actions were subject to section 1500, although it did not go so far as to say whether an interval of one day constituted a "simultaneous" filing.

[8] Assuming, *arguendo*, that Keene's voluntary withdrawal of its third-party complaint in *Miller* removed the bar to maintaining No. 579-79C in the Court of Claims as of December 21, 1979, the date of filing, section 1500 might bar its action if the rule in *Tecon Engineers* were overturned. Keene's complaint against the United States in *Keene Corp.* v. *United States*, No. 80 Civ. 0401 (S.D.N.Y., filed Jan. 22, 1980), is a later-filed case based on the same operative facts.

CONCLUSION

Defendant's motion is granted except as to GAF, No. 287-83C. The Clerk of the Court shall dismiss the complaints or amended complaints in Nos. 579-79C, 585-81C, 170-83C, 16-84C, 514-84C, 515-85C, and 12-88C for lack of subject matter jurisdiction.

IT IS SO ORDERED.

ORDER

[7] UNR filed its Petition for Partial Reconsideration on June 14, 1989, requesting revision of language in this court's opinion filed in *Keene Corp., et al.* v. *United States*, Nos. 579-79C, 585-81C, 170-83C, 287-83C, 16-84C, 514-84C, 515-85C & 12-88C (Cl.Ct. June 1, 1989). Defendant responded this date, stating that it does not interpose any objection to the relief requested.

UNR is correct that its "Amended List of Actions by UNR Industries, Inc., *et al.*, Against the United States, Etc.", filed on November 8, 1989, represented in footnotes that UNR had filed notices of dismissal of its third-party claims against the United States brought by Model Third Party Complaints A and B in the *In re All Maine Asbestos Litigation*. However, before including procedural history not supported by documents of record, this court was obligated to verify the facts with the courts involved. The Clerk's Office for the District of Maine advised that all legal proceedings in that court involving UNR continued to by stayed. Apparently, the recordation of the voluntary dismissal was overlooked since it had not been affirmatively acted upon by that court.

In response to UNR's petition for partial reconsideration, the District of Maine was again contacted, and the recordation of a voluntary dismissal of UNR's third-party actions on October 20, 1988, was confirmed. Accordingly,

IT IS ORDERED, as follows:

Plaintiffs' motion for partial reconsideration is granted.*

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* The portions of this Order amending the original opinion are incorporated therein.

APPENDIX F

IN THE

UNITED STATES COURT OF CLAIMS

No.
585-81 C

KEENE CORPORATION, Plaintiff

v.

THE UNITED STATES OF AMERICA, Defendant

PETITION

TO THE HONORABLE, THE CHIEF JUDGE
AND THE JUDGES OF THE UNITED STATES
COURT OF CLAIMS:

Plaintiff respectfully alleges as follows:

Nature of the Claim

1. Plaintiff seeks just compensation under the Fifth Amendment to the United States Constitution and Article I, Section 10 thereof for unconstitutional takings of plaintiff's property by the defendant without due process of law and without just compensation. The taking started in or about 1975 and has continued through the date of this Petition. Plaintiff believes that it will continue for the foreseeable future.

Jurisdiction

2. Jurisdiction of the Court is invoked pursuant to the Tucker Act, 28 U.S.C. Section 1491 (1970), as amended.

Keene's Identity

3. Plaintiff Keene Corporation ("Keene") is a corporation organized under the laws of the State of New Yorik and has its principal place of business at 200 Park Avenue, New York, New York.

4. In February 1968, Keene acquired substantially all of the outstanding stock of Baldwin-Ehret-Hill, Inc. ("B-E-H"), making B-E-H a subsidiary of Keene.

5. B-E-H was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret Magnesia Manufacturing company ("Ehret"), which had been formed in 1899, and Baldwin-Hill Company, which had been formed in 1935. B-E-H and its predecessors, Ehret and Baldwin-Hill, manufactured and sold thermal insulation products, some of which contained asbestos fibers.

6. B-E-H was operated as a Keene subsidiary until January 1970, when B-E-H and Keene Building Products Corporation ("KBPC"), a Delaware corporation and wholly-owned subsidiary of Keene, were merged. KBPC continued to operate the businesses of B-E-H as a subsidiary of Keene.

7. On October 8, 1974, by duly executed corporate resolutions, KBPC transferred "all of its assets and liabilities" relating to thermal insulation products to Keene. Thereafter, on the same date, the stock of KBPC was sold to a third party, and KBPC ceased to be a subsidiary of Keene. The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insultaion and Contracting Division. In 1975 and 1976, the contracting operations and all but one manufacturing plant of the Keene Insulation and Contracting Division were sold or closed. Keene, apart from its former subsidiary, has never made nor sold and does not now make nor sell any thermal insulation products containing asbestos.

Keene's Damages

8. More than 8,000 law suits have been commenced against Keene, KBPC or its predecessors by persons (hereinafter referred

to as "claimants") alleging personal injury or death from inhalation of asbestos fibers contained in thermal insulation products allegedly manufactured or sold by B-E-H, KBPC or their predecessors.

9. Keene has denied and continues to deny the allegatons of all complaints which seek to impose upon it damages as a result of the sale or use of products containing asbestos fibers. Notwithstanding such denials, Keene has been held legally liable to claimants for their damages and has been compelled to enter into settlements in appropriate cases. Certain monies paid by Keene in judgments or settlements as described above have been unjustly taken by the defendant as alleged herein.

10. Keene's claims in this action arose after Otober 8, 1974, the date of the transfer of assets and liabilities to Keene as set forth in paragraph 7 above.

11. Keene is and always has been the sole owner of the claims asserted herein, and Keene is entitled to recover the amount claimed from the defendant.

12. No action has been taken on Keene's claim by Congress or by any department of the Government or in any judicial proceeding.

The Nature of the Third Party Claims Against Keene

13. In the actions against Keene which seek to impose damages upon Keene as successor to KBPC and its predecessors as a result of the sale or use of products containing asbestos, the claimants have alleged exposure to asbestos fibers commencing as early as the mid-1930's.

14. Most of the claimants were involved in installing high temperature thermal insulation around pipes and boilers on naval ships, in power plants and in other industrial and commercial plants, including refineries.

15. Most of the claimants engaged in the installation of thermal insulation on naval vessels were either employees of the defendant, working in U.S. naval shipyards, or were employees working in private shipyard under contract to the U.S. Navy, an agency of the United States.

Relationship Between Keene and the Defendant

16. At the times relevant herein, defendant United States of America owned and operated naval shipyards for the construction and repair of its naval vessels. Numerous claimants were employed by the defendant in its naval shipyards when they incurred their alleged injuries.

17. At the times relevant herein, defendant also tuilized private shipyards for the construction and repair of its naval vessels (hereinafter "contract shipyards"), in which various claimants were employed when they incurred their alleged injuries.

18. In both its own naval shipyards and in its contract shipyards, defendant supervised and regulted the labor practices of the workers employed therein and determined and specified the manner and application of products containing asbestos on its naval vessels.

19. Defendant promulgated health standards and minimum safety requirements for both its own shipyards and its contract shipyards and conducted industrial health inspections of such shipyards for the purpose of determining the existence of any safety hazards therein.

20. At all relevant times herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by its naval shipyards, or its contract shipyards, for use in defendant's naval vessels.

21. At all times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by defendant, or by

private parties, for use in projects funded by defendant in whole or in part, or otherwise subject to defendant's control and regulation, on which projects claimant were employed.

22. KBPC and its predecessors were approved suppliers to defendant of thermal insulation containing asbestos that conformed to defendant's specifications. Pursuant to express contracts, KBPC and its predecessors sold such insulation for use by or for the benefit of the defendant.

Factual and Historical Allegations

23. The aliegations set forth in paragraphs 24 through 48 below were for the most part unknown to Keene and KBPC and its predecessors until after the proceedings alleged herein had been initiated by the claimants.

24. At all times relevant herein, defendant had superior knowledge of the hazards to insulation workers employed in its naval shipyards from exposure to asbestos dust and was conducting x-ray examinations of the lungs of such workers for evidence of asbestosis. These x-rays revealed peripheral lung markings which increased over time. Defendant further knew that the danger could be controlled by maintaining a modest level of exposure to asbestos fibers.

25. At all times relevant herein, defendant also had superior knowledge that existing safety and health standards were being violated in its U.S. Naval and contract shipyards.

26. In 1942, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial hygiene, adopted the 5 million particles per cubic foot ("p.p.c.f.") threshold limit value ("TLV") for asbestos fibers.

27. Some time prior to December 1942, the U.S. Maritime Commission, an agency of the defendant, and the U.S. Navy concurred that too little attention had been paid to matters involving the health and safety of shipyard employees and decided

to conduct a survey for the purpose of developing standards to govern the health of shipyard employees throughout the United States. Dr. Phillip Drinker of the Department of Industrial Hygiene, School of Public Health, Harvard University, and representatives of the U.S. Navy Bureau of Medicine and Surgery toured shipyards throughout the United States for the purpose of presenting to the shipyard industry, including the U.S. Navy, minimum standards for the protection of the health of shipyard employees.

28. In or about December 1942, as a result of the tour by Dr. Drinker and his Government associates, the defendant determined *inter alia*, that:

(a) asbestosis had occurred in shipyards utilized for the construction or refitting of defendant's naval vessels and was likely to occur again because asbestos was being handled with little or no precaution by insulation workers;

(b) the preventative programs then employed in such shipyards had been ineffective; and

(c) the health effects of asbestos could be controlled by enforcing appropriate ventilation standards in conjunction with mandatory, periodic examinations of shipyard employees.

29. In February 1943, the U.S. Navy and the U.S. Maritime Commission promulgated "Minimum Requirements for Safety and Health in Contract Shipyards." This report specifically identified asbestosis as a hazard of any operation which gave rise to asbestos dust but asserted that such operations could be performed safely by isolating them, providing ventilation, requiring the operators to wear respirators, and conducting periodic medical examinations.

30. Pursuant to the report referred to in No. 30 above, each shipyard holding contracts with the U.S. Navy and Maritime Commission was given notice that the Maritime Commission would make available safety and industrial health consultants charged with the coordination and supervision of the safety and

health programs of the two agencies and that each such shipyard was to cooperate with the assigned consultants and to comply fully with the promulgated minimum standards.

31. During the Second World War and immediately thereafter, despite the issuance of the Minimum Requirements, the problem of inhalation of asbestos dust was given low priority by defendant, and the operational control of occupational health hazards varied from shipyard to shipyard.

32. During the Second World War neither the U.S. Navy nor the U.S. Maritime Commission enforced its minimum safety and health requirements. This knowing failure to enforce such standards carried over into the postwar era.

33. In or about 1945, a study was conducted by health consultants from the U.S. Navy and Maritime Commission which represented, contrary to the defendant's superior knowledge, that in both government and contract shipyards thermal insulation workers were not engaged in a dangerous occupation.

34. During the early 1950's and therafter, considerable ship construction and modernization was undertaken in both U.S. Navy and contract shipyards, resulting in extensive worker exposure to asbestos dust including exposures in excess of the governing TLV's. During this period, defendant took few, if any, precautions on behalf of the insulation workers.

35. In 1965, an epidemiological study of asbestosis among insulation workers in the United States was undertaken. Evidence of pulmonary asbestosis was found in almost half the workers examined. Abnormalities were found in over ninety percent of the workers with more than forty years work experience. This study concluded that the installation of thermal insulation containing asbestos was a hazardous occupation.

36. In 1968, the American Conference of Governmental Industrial Hygienists determined that the TLV for asbestos dust should be reduced to 2 million p.p.c.f.

37. In February 1969, the Chief of the Navy's Bureau of Medicine and Surgery advised the Chief of Naval Operations that reports from U.S. Naval shipyards indicated continuing problems concerning the control of airborne asbestos and recommended that the industrial hygiene sections of the shipyards conduct surveys for the purpose of evaluating the effectiveness of ventilation control and respiratory protective devices.

38. Later in 1969, an internal U.S. Navy survey of both government and contract shipyards indicated that, in every instance, yard management was aware of the hazards attending the use of asbestos insulating materials but had failed to exercise sufficient care necessary to abate the problem.

39. During 1971 and 1972 dust counts at the Pearl Harbor Naval Shipyard and the Long Beach Naval Shipyard continued to reveal asbestos dust levels well in excess of the current TLV.

40. In 1972, the National Institute for Occupational Safety and Health adopted a new TLV in connection with the Occupational Safety and Health Act of 1970 ("OSHA"). Under this new standard, which was also adopted by the U.S. Navy, exposures were limited to 2 asbestos fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length. Peak concentrations were not to exceed 10 fibers per cubic centimeter.

41. At the times relevant herein, dust counts at the defendant's U.S. Naval and contract shipyards revealed asbestos dust levels far in excess of the governing TLV.

42. Throughout the period 1947 and thereafter, the defendant shipyards, as well as contract shipyards, incurred numerous cases of asbestosis and other harmful conditions.

43. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fibers and the improper manner in which asbestos-containing thermal insulation was being utilized and installed in facilities subject to its control and regulation in violation of

its own health and safety standards. Despite this knowledge, defendant continued to specify the inclusion of asbestos in thermal insulation for use by or for the benefit of defendant.

44. Defendant's programs to prevent asbestosis and other harmful conditions among insulaton workers in facilities subject to its control and regulation were inadequate or unenforced.

45. During the times relevant herein defendant had the duty to protect workers, including claimants, employed in facilities subject to its control and regulation, from asbestosis and other harmful conditions, but failed to exercise a sufficient degree of care to do so.

46. As a result of defendant's negligent or wrongful conduct numerous claimants have been injured.

PLAINTIFF'S FIRST CLAIM FOR RELIEF

47. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 47 inclusive.

48. Defendant asserts that its liability to claimants who were Government employees is limited to the compensation payable under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193. Defendant has refused to make any payments to such claimants other than the amounts which it claims it has paid as FECA benefits.

49. Notwithstanding its claim that it has paid FECA benefits to claimants, defendant has recouped and will continue to recoup, under 5 U.S.C. §8132, the amounts of FECA benefits it has paid to such claimants out of judgments and settlements which Keene has paid to the same claimants.

50. By recovering money paid by Keene to claimants, defendant has relieved itself of any responsibility for compensating claimants who were Government employees for their alleged injuries, notwithstanding defendant's conduct in causing those very injuries.

51. Since defendant's conduct caused the alleged injuries which have resulted in settlements and judgments which Keene has paid to claimants, keene is unconstitutionally deprived of property, and the defendant is unjustly enriched, by the defendant's retention of monies paid to claimants by Keene and refunded to defendant under FECA, 5 U.S.C. § 8132, and under related regulations, 20 C.F.R. § 10.503.

52. Defendant's recoupment of FECA benefits out of judgments and settlements paid by Keene to the same claimants is a direct and proximate cause of damages and injury suffered by Keene, because the amount of the underlying claims against Keene are increased by the amount of the FECA payments to be recouped by the defendant, thus increasing the cost to Keene of related settlements and judgments.

53. Defendant's recoupment of FECA benefits as herein set forth constitutes a taking of Keene's property without due process of law and without just compensation in violation of Keene's rights under the Fifth Amendment to the Constitution of the United States.

54. By reason of the foregoing, defendant is liable to Keene for the amounts of money that defendant has recouped from claimants out of judgments and settlements paid by Keene to the same claimants.

PLAINTIFF'S SECOND CLAIM FOR RELIEF

55. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 55 inclusive.

56. Defendant's recoupment of FECA benefits as set forth herein constitutes an impairment of Keene's contract rights without due process of law in violation of Keene's rights secured by the Fifth Amendment to the Constitution of the United States and Article I, Section 10 thereof.

57. By reason of the foregoing, defendant is liable to Keene for the amounts of money that defendant has recouped from

claimants out of judgments and settlements paid by Keene to the same claimants.

WHEREFORE, plaintiff demands judgment for the following relief:

1. That the Court enter judgment against defendant for the unconstitutional acts described above in an amount to be determined.

2. That the Court order an accounting to determine the amounts in which plaintiff has been damaged by defendant.

3. That the Court grant such other and further relief as it deems just and proper.

Respectfully submitted,

_____

Paul C. Warnke

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Attorney for Plaintiff

Dated: Washington, D.C.
September 25, 1981

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELSIE MILLER, personal representative of the Estate of Ada M. Dzon, Deceased,	:	
Plaintiff,	:	
	:	Civil Action No.
vs.	:	78-1283
JOHNS MANVILLE PRODUCTS CORPORATION, et al.,	:	
Defendants and Third-Party Plaintiff,	:	
vs.	:	
UNITED STATES GOVERNMENT and DRAVO CORPORATION,	:	
Third-Party Defendants.	:	

MOTION FOR VOLUNTARY DISMISSAL OF CLAIM AGAINST THIRD-PARTY DEFENDANT UNITED STATES OF AMERICA

AND NOW comes the defendant and third-party plaintiff, Keene Building Products Corporation, by its attorneys, KYLE AND EHRMAN, and respectfully requests that its claim against the third-party defendant, United States of America, be voluntarily dismissed without prejudice and assigns the following reasons:

1. That Keene Building Products Corporation has entered into a Joint Tort Release Agreement with the plaintiff.

2. That under the facts and circumstances of the case, it would not be economically or judicially feasible to proceed with the action at this time against the United States of America.

3. That Keene Building Products Corporation has instituted an action in the Court of Claims against the United States of America which should resolve the differences between the parties.

WHEREFORE, this defendant and third-party plaintiff respectfully requests that the action against the United States of America be voluntarily dismissed without prejudice.

Respectfully submitted,

KYLE AND EHRMAN

BY /s/ _____

Attorneys for Defendant and
Third-Party Plaintiff, Keene
Building Products Corporation.

ORDER OF COURT

AND NOW, to-wit, this _____ day of _____, 1980, the defendant and third-party plaintiff, Keene Building Products Corporation, having filed a Motion for Leave to Voluntarily Dismiss its third-party claim against the United States;

IT IS ORDERED that the Motion be and the same hereby is granted and the action is hereby dismissed without prejudice.

By the Court

_____

APPENDIX II

IN THE

UNITED STATES COURT OF CLAIMS

No.
579-79 C

KEENE CORPORATION, Plaintiff

v.

THE UNITED STATES OF AMERICA, Defendant

PETITION
(Filed:

TO THE HONORABLE, THE CHIEF JUDGE AND THE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Plaintiff respectfully alleges as follows:

COUNT I

Nature of the Claim

1. This petition seeks damages against the United States of America for indemnity, contribution and/or apportionment arising from express and implied contracts between said defendant and Keene Building Products Corporation (a former subsidiary of plaintiff Keene Corporation) and its predecessors.

Keene's Identity

2. Plaintiff Keene Corporation ("Keene") is presently a corporation organized under the laws of Delaware and has its principal place of business at 200 Park Avenue, New York, New York. As of January 1, 1980, Keene will be a corporation organized under the laws of New York.

3. Keene brings this action under the general jurisdiction of the Court, 28 U.S.C. Section 1491 (1970).

4. Ehret Magnesia Manufacturing Company ("Ehret") was formed in Pennsylvania in 1899 under the name Asbestos Manufacturing Company and subsequently changed its name to Ehret. Baldwin-Hill Company was formed in New Jersey in 1935. Baldwin-Ehret-Hill, Inc. ("B-E-H") was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret and Baldwin-Hill Company. Pursuant to Title 15 §1907 of Pennsylvania Statutes Annotated and Title 14:12-5 of the Revised Statutes of New Jersey, then applicable, the rights, powers and privileges of the merged corporations vested in B-E-H, the successor corporation. B-E-H and its predecessors, Ehret and Baldwin-Hill, manufactured and sold thermal insulation products some of which contained asbestos fibers.

5. In February 1968, Keene acquired substantially all of the outstanding stock of B-E-H, making B-E-H a subsidiary of Keene. B-E-H was operated as a Keene subsidiary until 1970.

6. In January 1970, there was a statutory merger between B-E-H and a wholly-owned subsidiary of Keene named Keene Building Products Corporation ("KBPC"). KBPC continued to operate the businesses of B-E-H as a subsidiary of Keene. Pursuant to Title 15 §1907 of Pennsylvania Statutes Annotated and Title 8 §259 of Delaware Code Annotated, then applicable, the rights, powers and privileges of the merged corporations vested in KBPC, the successor corporation.

7. In October 1974, KBPC transferred a substantial portion of its assets and liabilities to Keene. The transferred liabilities included only those which were known and which related to the manufacture and installation of thermal insulation products. Those retained by KBPC related to the manufacture of certain noise control products and had nothing whatsoever to do with insulation products. Subsequent to the transfer of assets and liabilities but still in October 1974, the stock of KBPC was sold to a third party, KBPC thus ceasing to be a subsidiary of Keene.

The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations and all but one manufacturing plant of the Keene Insulation and Contracting Division were sold or closed. Keene, apart from its subsidiary, has never and does not now make nor sell any thermal insulation products containing asbestos.

Keene's Injury

8. More than 2,500 law suits have been commenced against Keene, KBPC and/or its predecessors by persons alleging personal injury or death from inhalation of asbestos fibers contained in thermal insulation products allegedly manufactured or sold by B-E-H or KBPC, or their predecessors.

9. Keene has denied and continues to deny the allegations of all complaints which seek to impose upon it damages as a result of the sale or use of products containing asbestos fibers. Notwithstanding such denial, a court may nevertheless impose liability upon Keene and because of the very expensive, uncertain and time-consuming nature of litigation, Keene has been compelled to enter and will continue to enter into reasonable settlements in appropriate cases. In addition, as a result of such actions, Keene has and will continue to incur expenses, including increased expenses relating to insurance coverage, and has and will be compelled to pay reasonable sums to defend such actions.

10. Keene is and always has been the sole owner of the claims asserted herein and Keene is justly entitled to recover the amount claimed from the defendant.

11. No action is now pending on Keene's claim by Congress or by any department of the Government or in any judicial proceeding other than as set forth herein.

The Nature of the Third Party Claims Against Keene

12. In these actions the plaintiffs (hereinafter referred to as the "claimants") have alleged exposure to asbestos fibers over

their work histories commencing as early as the mid-1930's.

13. Most of the claimants were involved in installing high temperature thermal insulation around pipes and boilers, naval ships, power plants and other industrial and commercial plants, including refineries.

14. Most of the claimants engaged in the installation of thermal insulation on naval vessels were either employees of the defendant working in U.S. naval shipyards, or were employees working in private shipyards under contract to the U.S. Navy, an agency of the United States.

15. In the actions against Keene the complaints have typically alleged that:

(a) the claimant worked with or around thermal insulation products containing asbestos;

(b) in the course of his work the claimant cut asbestos-containing thermal insulation with a saw or a knife, ripped out old asbestos-containing thermal insulation preparatory to installing new such insulation, and/or mixed asbestos-containing cement prior to application;

(c) all of the foregoing activities created air-borne dust, containing asbestos fibers;

(d) the claimant inhaled such dust; and

(e) such inhalation caused asbestosis or other harmful conditions.

Relationship Between Keene and the Defendant

16. At the times relevant herein, defendant United States of America owned and operated naval shipyards for the construction and repair of its naval vessels, in which various claimants were employed at times that they were incurring their alleged injuries.

17. At the times relevant herein, defendant also utilized private shipyards for the construction and repair of its naval vessels, (hereinafter "contract shipyards") in which various claimants were employed at times that they were incurring their alleged injuries.

18. In both its own naval shipyards and in its contract shipyards, defendant supervised and regulated the labor practices of the workers employed therein and determined and specified the manner and application of products containing asbestos in its naval vessels.

19. Defendant promulgated health standards and minimum safety requirements for both its own shipyards and its contract shipyards and conducted industrial health inspections of such shipyards for the purpose of determining the existence of any safety hazards therein.

20. At all relevant times defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by its naval shipyards, or its contract shipyards, for use in its naval vessels.

21. At times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by defendant, or by private parties, for use in projects funded by defendant in whole or in part, or otherwise subject to defendant's control and regulation, on which claimants may have been employed.

22. As used herein, the term "control" shall be given its usual and accepted meaning, including but not limited to the circumstance, that if defendant could require the use of asbestos-containing thermal insulation at any facility, that facility was subject to defendant's control.

23. At times relevant herein, defendant sold to KBPC and its predecessors asbestos fiber.

24. KBPC and its predecessors incorporated this asbestos fiber purchased from defendant into certain of their thermal

insulation products without any alteration of such asbestos, or in any way changing its characteristics.

25. At times relevant herein, KBPC and its predecessors sold their thermal insulation products incorporating asbestos fiber purchased from the defendant, to defendant and to others.

26. KBPC and its predecessors used the asbestos fibers supplied to them by the defendant in the manner for which said asbestos fibers were intended and/or in a manner which was reasonably foreseeable by the defendant.

27. The claimants have alleged injury from exposure to thermal insulation which allegedly contained asbestos fibers supplied to KBPC and its predecessors by the defendant.

28. The allegations comprising the factual background set forth in paragraphs 29 through 75 below were for the most part unknown to Keene and KBPC and its predecessors until after the proceedings alleged herein had been initiated by the claimants.

Factual Background

29. Beginning at least as early as 1934, defendant had been provided with a draft study indicating that exposure to asbestos dust caused a pulmonary fibrosis which was demonstrable on X-ray films.

30. In or about January 1935, the U.S. Public Health Service, an agency of the defendant, published this study on the negative effects of the inhalation of asbestos dust on the lungs of workers in the asbestos textile industry.

31. Nevertheless, in 1934, the U.S. Navy commenced the development of asbestos-insulating materials.

32. By 1937, defendant had adopted the use of insulating materials containing asbestos in its naval vessels.

33. In or about 1938, the U.S. Public Health Service published a study of asbestosis in the asbestos textile industry. The objectives of the study were: to determine the effects of long-continued inhalation of asbestos dust on the human body; to identify the manufacturing processes that create dust; to recommend practices, and, when necessary, equipment that would reduce the dust exposure of workers; and to discover what concentrations of asbestos dust, if any, could be tolerated without injury to health. This study concluded that:

(a) asbestos dust exposure could be held responsible for the cases of pneumoconiosis that had been found in textile factories; and

(b) because clear-cut cases of asbestosis were found only in conjunction with dust concentrations exceeding 5 million particles per cubic foot ("p.p.c.f."), and not at lower concentrations, until better data was available, 5 million p.p.c.f. could be regarded as the threshhold limit value ("TLV") for asbestos dust exposure in asbestos factories.

34. The above study urged precautionary measures and elimination of hazardous exposures as follows:

(a) dust control at the point of origin by means of local exhaust hoods so that no dust could reach the breathing zone of workers or contaminate the general air;

(b) clean air should replace the dust laden air removed by the exhaust systems;

(c) workers entering rooms where dust conditions existed should be equipped with approved respirators; and

(d) periodic studies of the condition of the working environment should be conducted to determine whether existing control methods remained adequate.

35. At least as early as 1940, defendant was aware of the hazards of asbestos dust exposures to insulation workers employed in its naval shipyards and was conducting X-ray

examinations of the lungs of such workers for evidence of asbestosis. These X-rays revealed peripheral lung markings which increased over time.

36. At least as early as January 1941, the U.S. Department of Interior, Bureau of Mines, an agency of the defendant, published a list of approved respirators for protection against the inhalation of pneumoconiosis-producing dusts such as asbestos.

37. The Second World War marked the beginning of a concentrated construction program to build combat and other vessels necessary for the war effort. In 1943, defendant's shipyards employed 1,750,000 civilians. It has been estimated that altogether from 3 to 3.5 million civilians worked in defendant's shipyards during the Second World War.

38. In 1942, the American Conference of Governmental Industrial Hygenists, a quasi-offical body responsible for making recommendations concerning industrial hygiene, adopted the 5 million p.p.c.f. TLV first proposed by the U.S. Public Health Service in 1938.

39. Some time prior to December 1942, the U.S. Maritime Commission, an agency of the defendant, and the U.S. Navy, concurred that too little attention had been paid to matters involving the health and safety of shipyard employees and decided to conduct a survey for the purpose of developing standards to govern the health of shipyard employees throughout the United States. Dr. Phillip Drinker of the Department of Industrial Hygiene, School of Public Health, Harvard University, and representatives of the U.S. Navy Bureau of Medicine and Surgery toured shipyards throughout the United States for the purpose of presenting to the shipyard industry, including the Navy, minimum standards for the protection of the health of shipyard employees.

40. In or about December 1942, as a result of the tour by Dr. Drinker and his associates, it was determined *inter alia*, that:

(a) asbestosis had occurred in shipyards utilized for the construction or refitting of defendant's naval vessels and was likely to occur again because asbestos was being handled with little or no precautions by insulation workers;

(b) the preventative programs then employed in such shipyards had been ineffective; and

(c) the asbestos health hazard could be controlled by enforcing appropriate ventilation standards in conjunction with mandatory, periodic examinations of shipyard employees.

41. In February 1943, the U.S. Navy and the U.S. Maritime Commission promulgated "Minimum Requirements for Safety and Health in Contract Shipyards." This report specifically identified asbestosis as a hazard of any operation which gave rise to asbestos dust, but asserted that such operations could be performed safely by isolating them, providing ventilation, requiring the operators to wear respirators, and conducting periodic medical examinations.

42. Pursuant to the above report, each shipyard holding contracts with the U.S. Navy and Maritime Commission was given notice that the Maritime Commission would make available safety and industrial health consultants charged with the coordination and supervision of the safety and health programs of the two agencies and that each such shipyard was to cooperate with the assigned consultants and to fully comply with the promulgated minimum standards. These standards required, *inter alia*, the:

(a) appointment of a full time safety director and support staff for each contract shipyard;

(b) appointment of a ventilation supervisor for each shift, responsible to the safety director;

(c) exhaust ventilation adequate to remove hazardous air impurities;

(d) protective respiratory equipment for jobs involving asbestos-containing material; and

(e) assignment of his own, individual respirator to each worker requiring one.

43. During the Second World War and immediately thereafter, despite the issuance of the Minimum Requirements, the problem of asbestos dust inhalation was given low priority, by defendant, and the operational control of occupational health hazards varied from shipyard to shipyard.

44. During the Second World War neither the Navy nor the Maritime Commission enforced their own minimum requirements. This laxity and indifference carried over into the postwar era.

45. In or about 1945, a study was conducted by health consultants from the U.S. Navy and Maritime Commission into the health conditions of workers installing asbestos insulation in both government and contract shipyards.

46. This study indicated that the minimum requirements promulgated in 1943 were being violated in all of the shipyards surveyed. Exhaust ventilation was for the most part non-existent or inadequate and respirators were worn by few if any workers. The asbestos dust concentrations were far in excess of the 5 million p.p.c.f. TLV first suggested by the Public Health Service in 1938.

47. The above study again recommended that adequate exhaust ventilation and respirators were necessary to the maintenance of a low incidence of asbestosis.

48. In 1946 and 1947, the American Conference of Governmental Industrial Hygenists again recommended that the TLV for dust containing asbestos should be below 5 million p.p.c.f.

49. During the early 1950's, considerable ship modernization was undertaken in both Navy and contract shipyards, resulting in extensive worker exposure to dust from ripped-out thermal

insulation containing asbestos. During this period, defendant took few if any precautions on behalf of the insulation workers.

50. The October 1962 issue of the Navy's "Safety Review" published findings that adequate precautions had not been taken at naval shipyards to protect workers against asbestosis and that shipyard insulation employees were engaged in a hazardous trade.

51. In May - June 1964, the head of the Medical Department, Long Beach Naval Shipyard ("LBNS") stated that adequate ventilation for insulation workers was not possible to achieve with the ventilating systems available at LBNS and the workers were therefore exposed to hazardous dust counts which had resulted in asbestosis.

52. In and around 1964, dust counts made at the Norfolk Naval Shipyard ("NNS"), revealed that insulators were exposed to levels of 5-50 million p.p.c.f. and occasionally higher. Recommendations of the Industrial Hygiene Division at NNS for improvement of these conditions were being ignored and had been for some time and it was unknown whether workers were wearing respirators, or wearing them in a proper manner.

53. In June 1965, NNS measured dust counts during the ripout of asbestos insulation from naval ships. Dust counts ranging from 30 to 115 million p.p.c.f. were recorded in the breathing zone.

54. In 1965, an epidemiological study of asbestosis among insulation workers in the United States was undertaken. Evidence of pulmonary asbestosis was found in almost half the workers examined. Among those with more than forty years experience, abnormalities were found in over ninety percent. This study concluded that the installation of asbestos-containing insulation was a hazardous occupation.

55. In 1968, the American Conference of Governmental Industrial Hygienists determined that the TLV for asbestos dust should be reduced to 2 million p.p.c.f.

56. In March 1968, a study by the Industrial Hygiene Division of the San Francisco Bay Naval Shipyard ("SFBNS") indicated that insulators were being exposed to asbestos dust concentrations above the TLV, then extant, during various shipboard operations, including cutting, sawing and rip-out.

57. In December 1968, the Portsmouth Naval Shipyard ("PNS") conducted an investigation of the control of asbestos dust. This investigation revealed a dust problem in the shop area, although PNS officials believed that it could be reduced to an acceptable level. Asbestos dust control aboard ship was very limited in spite of the PNS medical department's expression of strong reservations concerning this condition.

58. In February 1969, the Chief of the Navy's Bureau of Medicine and Surgery sent a letter to the Chief of Naval Operations advising him that reports from naval shipyards indicated continuing problems concerning the control of airborne asbestos and recommended that the industrial hygiene sections of the shipyards conduct surveys for the purpose of evaluating the effectiveness of ventilation control and respiratory protective devices. Later that same year, the Bureau of Medicine and Surgery opined that even one heavy exposure to asbestos dust could be injurious.

59. In or about March 1969, dust counts taken at the Pearl Harbor Naval Shipyard ("PHNS") indicated asbestos dust exposure levels from 12 to 68 million p.p.c.f. during various operations including cutting, sawing and rip-out.

60. Later in 1969, a Navy survey of both government and contract shipyards was published, indicating that in every instance yard management was aware of the hazards attending the use of asbestos insulating materials, but had failed to exercise sufficient care necessary to seek to abate the problem.

61. This report further indicated that the wearing of respirators was not generally enforced and that dust counts were excessive due to inadequate exhaust ventilation and other improper practices.

62. The above report concluded: that considerable asbestos-containing insulation material currently was being used in naval applications; that stringent handling precautions were not being enforced; and that the use of high asbestos-containing thermal insulating materials should be curtailed due to the hazards to the health of insulation workers.

63. Recognition of the occupational health problem posed by asbestos and other physically harmful substances in part led to the passage of the Occupational Safety and Health Act of 1970 ("OSHA").

64. In February 1971, the Commander, Naval Ship Systems Command, ordered elimination of high asbestos content materials for all new construction provided that for present contracts, the change would be issued as a full priced supplemental agreement which would result in no increase in cost and no extension of delivery dates.

65. In September, 1971, the U.S. General Services Administration indicated to the Navy that it had a substantial amount of asbestos-containing material and asked the Navy not to eliminate GSA as a source of such materials.

66. During 1971 and 1972 dust counts at the PHNS and the LBNS continued to reveal asbestos dust levels well in excess of the then current TLV.

67. In 1972, the National Institute for Occupational Safety and Health adopted a new TLV in connection with OSHA. Under this new standard, which was also adopted by the Navy, exposures were limited to 2 asbestos fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length. Peak concentrations were not to exceed 10 fibers per cubic centimeter.

68. During 1974, naval shipyards continued to stock, order and use insulating material containing asbestos, although acceptable substitutes were available.

69. In 1975, dust counts at the Puget Sound Naval Shipyard ("PSNS") revealed asbestos dust levels far in excess of the TLV adopted in connection with OSHA.

70. As late as February 1977 - March 1978, the Navy concluded that the asbestos control procedures in its shipyards continued to be inadequate. Subsequently, in 1979, a study published by defendant's Comptroller General concluded that the Navy continued to take inadequate precautions to protect employees in its shipyards from asbestos exposures in excess of the OSHA standard.

71. Throughout the period 1947 and thereafter, the LBNS, the PSNS, the NNS, the Boston Naval Shipyard and other government shipyards, as well as contract shipyards, reported numerous cases of asbestosis and other harmful conditions.

72. During the times relevant herein, defendant believed that the inhalation of asbestos laden dust might cause asbestosis and other harmful conditions. Defendant further believed that the danger could be controlled by maintaining a modest level of exposure.

73. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fibers and the improper manner in which asbestos-containing thermal insulation was being utilized and installed in facilities subject to its control and regulation in violation of its own safety standards.

74. Defendant's programs to prevent asbestosis and other harmful conditions among insulation workers in facilities subject to its control and regulation have been haphazard, inadequate and/or unenforced.

75. During the times relevant herein defendant had the duty to protect workers, including claimants, employed in facilities subject to its control and regulation, from asbestosis and other harmful conditions, but failed to exercise a sufficient degree of care to do so.

Allegations Against the Defendant

76. In 1971 and, on information and belief, on other prior occassions, KBPC and its predecessors purchased asbestos fiber from defendant pursuant to express contracts. For example, on or about May 19, 1971, pursuant to Order Number T-1480 and on or about September 27, 1971, pursuant to Contract Number GS-00-DS-(S)-23062 the United States of America through its General Services Administration sold to KBPC 430 short tons of amosite asbestos fibers at a total price of $79,550.

77. As a supplier of asbestos fiber incorporated unchanged into thermal insulation products manufactured by KBPC and its predecessors, defendant implicitly warranted that such asbestos fiber was safe to use for this purpose.

78. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

79. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

80. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that the asbestos fiber supplied by defendant to KBPC and its predecessors was not safe for its intended and foreseeable use.

81. By reason of the foregoing, defendant is liable to Keene for any amounts which have been, or which may be recovered from Keene by the claimants, by settlement or judgment, and defendant is additionally liable to Keene by reason of said breach for the costs incurred by Keene as a result of the proceedings initiated by the claimants, including attorneys' fees, increased insurance costs and the cost of executive time expended on such claims.

COUNT II

82. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

83. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

84. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

85. Defendant had the further duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

86. As the party which required its independent contractors to use asbestos-containing thermal insulation at various facilities, with knowledge of its alleged danger, the defendant also had the duty to see that its independent contractors took the necessary precautions to protect the health of their asbestos insulation workers, including claimants, from any hazards attendant on the use of asbestos.

87. The above duties imposed upon defendant the obligation to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health safety standards.

88. As the party responsible for regulating the work practices of all such claimants and for providing them with a safe place to work, or assuring that they were so provided, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos sold to defendant by KBPC and its predecessors for use at facilities subject to defendant's regulation and control would be installed and otherwise handled in a safe manner.

89. KBPC and its predecessors relied upon this warranty.

90. If Keene is deemed to be liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant

failed to take adequate precautions to assure that asbestos-containing thermal insulation used in facilities subject to its control and regulation, was installed or otherwise handled in a safe manner.

91. On the basis of its superior knowledge defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

92. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT III

93. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

94. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

95. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

96. Defendant at various times relevant herein has inspected its naval and contract shipyards and other facilities subject to its control and regulation at which claimants were employed, to determine whether any safety hazards existed at said facilities and/or in any of the products containing asbestos fibers located or installed therein.

97. By conducting such inspections, and having the authority to regulate the working conditions at such facilities, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos sold to defendant by KBPC and its predecessors for use at such facilities would be installed or otherwise handled in a safe manner.

98. KBPC and its predecessors relied on this warranty.

99. If Keene is deemed to be liable to any claimants for injuries alleged in their numerous complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation used at the foregoing facilities, was installed or otherwise handled in a safe manner.

100. On the basis of its superior knowledge defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

101. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT IV

102. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

103. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

104. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

105. As the designer and issuer of the specifications requiring the use of asbestos in thermal insulation manufactured by KBPC and its predecessors and intended for use on defendant's naval vessels and in facilities subject to its control and regulation, defendant implicitly warranted that if its specifications were complied with, satisfactory performance would result, or, in other words, that thermal insulation containing asbestos, manufactured to defendant's specifications, was safe for its intended use.

106. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

107. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

108. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's specifications were faulty and defendant's warranty was false and was breached by reason of the fact that the asbestos-containing thermal insulation manufactured pursuant to defendant's specifications was not safe for its intended and foreseeable use.

109. On the basis of its superior knowledge defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

110. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

WHEREFORE, Keene demands judgment against defendant for indemnity or contribution, or both, and/or apportionment, for any amounts which have been or which may be recovered from Keene by the claimants and for the costs incurred by Keene as a result of the proceedings initiated by the claimants including attorneys' fees, increased insurance costs and the cost of executive time expended on such claims, plus the costs and disbursements of this action and any further relief that is just and appropriate.

Dated: New York, New York
December 20, 1979

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-and-

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELSIE MILLER, Personal Representative of the Estate of ADA M. DZON, Deceased,	:	
Plaintiff,	:	Civil Action
vs.	:	No. 78-1283E
JOHNS-MANVILLE PRODUCTS CORPORATION, a corporation, JOHNS-MANVILLE SALES CORPORATION, a corporation, UNARCO INDUSTRIES, INC., a corporation, GAF CORPORATION, a corporation, RAYBESTOS-MANHATTAN, INC., a corporation, KEENE BUILDING PRODUCTS CORPORATION, a corporation, EAGLE PICHER INDUSTRIES, INC., a corporation, and FORTY EIGHT INSULATIONS, INC., a corporation,	:	
Defendants and Third-Party Plaintiff,	:	
vs.	:	
UNITED STATES GOVERNMENT and CELOTEX CORPORATION,	:	
Third-Party Defendants.	:	

AMENDED THIRD-PARTY COMPLAINT

AND NOW comes the Defendant and Third-Party Plaintiff, Keene Corporation, erroneously styled as Keene Building Products Corporation, and makes this Third-Party Complaint against United States Government and Celotex Corporation as follows:

1. The plaintiff has filed a Complaint against Keene Building Products Corporation and the other named defendants alleging that the plaintiff's decedent, while employed by Dravo Corporation from 1943 until 1944, as a laborer, was exposed to and did inhale asbestos dust and fibers, which caused the condition as alleged in plaintiff's Complaint and as more fully set forth in plaintiff's Complaint. A true and correct copy of the plaintiff's Complaint is attached hereto and made a part hereof and marked as Exhibit "A".

2. This Defendant and Third-Party Plaintiff has filed an Answer denying any and all liability. A true and correct copy of said Answer is attached hereto, made a part hereof and incorporated by reference, marked as Exhibit "B".

3. The Court has jurisdiction over this action pursuant to Title 28 U.S.C.A. Section 1346 (b), since the plaintiff's decedent's alleged claim is for money damages occurring on and after January 1, 1945 for personal injury and death.

4. The United States Government has waived immunity to suit pursuant to Title 28 U.S.C.A. Section 2674.

5. Third-Party Defendant, Celotex Corporation, is a Delaware Corporation and a subsidiary of Walter Jim Corporation with an office for conducting business located at 1500 North Bale Mabery Highway, Tampa, Florida, and is qualified to do business in the Commonwealth of Pennsylvania and, further, is the successor to Phillip Carey Manufacturing Company.

6. This defendant avers that at the times relevant to plaintiff's Complaint, plaintiff's decedent, during the course of her employment as a laborer at Dravo Corporation, if she was exposed to and did inhale asbestos fibers and dust, said dust and fibers were those of products mined, milled, manufactured, fabricated, supplied and/or sold by the Third-Party Defendant, Celotex Corporation, or its predecessor, the Phillip Carey Manufacturing Company.

7. This defendant avers that if the plaintiff's decedent was exposed to dust or fibers of asbestos products, those products

were supplied by the United States Government or were supplied to the United States Government pursuant to specifications instituted by the United States Government and required by the United States Government Contracts.

8. At all times material hereto, the United States Government was acting through its employees who were acting within the scope of their office or employment.

9. This defendant has denied any and all liability. However, in the alternative, if this defendant is found liable, a liability it expressly denies, then it is averred that the Third-Party Defendants are jointly and severally liable with this defendant to plaintiff for the reasons averred in the plaintiff's Complaint, the contents of which are herein incorporated by reference as though the same were set forth herein at length and verbatim. This defendant avers that the Third-Party Defendants are liable over to it for contribution and/or indemnity and for the purpose of asserting a Crossclaim against said Third-Party Defendants only does incorporate the allegations of plaintiff's Complaint, specifically, that Third-Party Defendants are liable to plaintiff for their negligence, breach of warranty and as a result of the strict duty and liability imposed under Sec. 402A of the Restatement of Torts 2d.

WHEREFORE, Keene Building Products Corporation, Defendant and Third-Party Plaintiff, demands judgment against the Third-Party Defendants for part of or for all sums by way of either contribution or indemnity that may be adjudged against this party and in favor of the plaintiff.

KYLE AND EHRMAN

BY _____

Attorney for Defendant,
Keene Building Products Corp.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELSIE MILLER, Personal Representative of the Estate of ADA M. DZON, Deceased,

Plaintiff

vs.

JOHNS-MANVILLE PRODUCTS CORPORATION, a corporation, JOHNS-MANVILLE SALES CORPORATION, a corporation, UNARCO INDUSTRIES, INC., a corporation, GAF CORPORATION, a corporation, RAYBESTOS-MANHATTAN, INC., a corporation, THE CELOTEX CORPORATION, a corporation, KEENE BUILDING PRODUCTS CORPORATION, a corporation, EAGLE PICHER INDUSTRIES, INC., a corporation, and FORTY EIGHT INSULATIONS, INC., a corporation,

Defendants

Civil Action
No. 78-1283E

A JURY TRIAL IS DEMANDED

C O M P L A I N T

FIRST: The plaintiff is an individual and Personal Representative of the Estate of Ada M. Dzon, and is a citizen of the State of Florida, and decedent, Ada M. Dzon, was a citizen of the State of Florida.

SECOND: The defendant, Johns-Manville Products Corporation, is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Denver, Colorado and is qualified to do business in the Commonwealth of Pennsylvania with offices for the conducting of business located at Monroe Complex, Building #3, Suite #2, Mosside Boulevard, Monroeville, Pennsylvania 15146.

THIRD: The defendant, Johns-Manville Sales Corporation, is a corporation incorporated under the laws of the State of Delaware and having its principal place of buisness in Denver, Colorado and is qualified to do business in the Commonwealth of Pennsylvania with offices for the conducting of business located at Monroe Complex, Building #3, Suite #2, Mosside Boulevard, Monroeville, Pennsylvania 15146.

FOURTH: The defendant, Unarco Industries, Inc., is a corporation incorporated under the laws of the State of Illinois and having its principal place of business in Chicago, Illinois and is qualified to do business in the Commonwealth of Pennsylvania.

FIFTH: The defendant GAF Corporation is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in New York, New York and is qualified to do business in the Commonwealth of Pennsylvania.

SIXTH: The defendant Raybestos-Manhattan, Inc., is a corporation incorporated under the laws of the State of New Jersey and having its principal place of business in the Trumball, Connecticut and is qualified to do business in the Commonwealth of Pennsylvania.

SEVENTH: The defendant The Celotex Corporation is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Tampa, Florida and is qualified to do business in the Commonwealth of Pennsylvania.

EIGHTH: The defendant Keene Building Products Corporation is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Sante Fe Springs, California and is qualified to do business in the Commonwealth of Pennsylvania.

NINTH: The defendant, Eagle Picher Industries, Inc., is a corporation incorporated under the laws of the State of Ohio and having its principal place of business located in the State of Ohio and is qualified to do business in the Commonwealth of Pennsylvania.

TENTH: The defendant, Forty-Eight Insulations, Inc., is a corporation incorporated under the laws of the State of Illinois and having its principal place of business located in Aurora, Illinois and is qualified to do business in the Commonwealth of Pennsylvania.

ELEVENTH: Jurisdiction is conferred by reason of the diversity of citizenship of the parties and the amount in controversy exceeds Ten Thousand ($10,000.00) Dollars, exclusive of costs and interest.

TWELFTH: At all times pertinent hereto, the defendants acted through their duly authorized agents, servants and employees, who were then and there in the course and scope of their employment and in furtherance of the business of said defendants.

THIRTEENTH: Plaintiff's decedent died on November 10, 1977 from malignant mesothelioma.

FOURTEENTH: At all times relevant hereto, the plaintiff's decedent worked for Dravo Corporation, Neville Island, Pittsburgh, Pennsylvania, from 1943 until 1944 as a laborer.

FIFTEENTH: During the period of time set forth hereinabove, plaintiff's decedent, while employed by said Dravo Corporation as a laborer, was exposed to and did inhale asbestos dust and fibers which caused the condition as hereinafter set forth resulting in plaintiff's decedent's disability and death.

SIXTEENTH: Defendants, at all times relevant and pertinent hereto, were engaged in the business of mining, milling, manufacturing, fabricating, supplying and selling asbestos containing products to which plaintiff's decedent was exposed.

SEVENTEENTH: Solely and directly as a result of the inhalation of the asbestos fibers and dusts contained in the products of defendants, plaintiff's decedent contracted malignant mesothelioma with associated complications which resulted in her disability and death.

EIGHTEENTH: Plaintiff's decedent's disease of malignant mesothelioma with associated complications were solely and directly caused by the acts of the defendants acting through their agents, servants and employees and the defendants are liable therefore, jointly and severally, to the plaintiff for their negligence, breach of warranty and as a result of the strict duty and liability imposed under § 402A of the *Restatement of Torts (Second)*.

NINETEENTH: The defendants mined, milled, manufactured, fabricated, supplied and sold asbestos containing products which they knew were unreasonably dangerous to the user or consumer, such as plaintiff's decedent, and acted in such a manner which was willful, wanton, gross and in total disregard for the health and safety of the user or consumer, i.e. plaintiff's decedent.

TWENTIETH: Defendants, individually, together and/or as a group, have possessed, since 1929, medical and scientific data which indicated that asbestos containing insulation materials were hazardous to health. Prompted by pecuniary motives, the defendants, individually, together and/or as a group, willfully and wantonly ignored and/or failed to act upon said medical and scientific data. Rather, they conspired together to deceive the public in several respects: by controlling industry-supported research in a manner inconsistent with the health and safety interests of asbestos users and consumers; by successfully tainting reports of medical and scientific data appearing in industry and medical literature; by suppressing the dissemination of certain medical and scientific information relating to the harmful effects of exposure to asbestos containing products; and by prohibiting the publication of certain scientific and medical articles. Such conspiratorial activities deprived the users, mechanics, laborers and installers of defendants' asbestos products, of the opportunity to determine whether or not they would expose themselves to the unreasonably dangerous asbestos products of said defendants.

TWENTY FIRST: As a result of the disability and death of plaintiff's decedent resulting from malignant mesothelioma with

associated complications, the plaintiff seeks compensatory damages for personal injuries and under the applicable Survival and Wrongful Death Statutes.

TWENTY SECOND: The plaintiff further seeks exemplary and punitive damages against the defendants to punish the defendants for their actions which were willful, wanton, gross and in total disregard of the health and safety of the users and consumers of their products, as well as those elements of a civil conspiracy set forth in Paragraph (20) above, i.e. plaintiff's decedent, in an amount in excess of Ten Thousand ($10,000.00) Dollars.

Hence this suit.

NORMAN A. GREEN

s/s Norman A. Green
Attorney for Plaintiff

BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN

By s/s Thomas W. Henderson
Thomas W. Henderson
Attorney for Plaintiff